

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-1567

76-1567

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

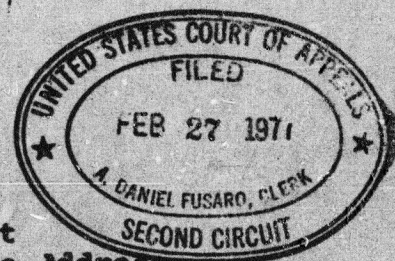
DAVID BRYANT,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

APPENDIX

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APPENDIX

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PAGINATION AS IN ORIGINAL COPY

1 DONNA H. VICKERS, 250 Hayward Avenue,
2 Rochester, New York, called as a witness on behalf of the
3 Government, and being first duly sworn, testified as follows:

4 DIRECT EXAMINATION BY MR. HOULIHAN:

5 Q Mrs. Vickers, by whom are you employed?

6 A Lincoln First Bank.

7 Q How long have you worked for them?

8 A Three years.

9 Q What do you do at Lincoln First?

10 A Right now I'm the auto teller.

11 Q I call your attention to the date of June 20, 1975, were
12 you in the bank on that day?

13 A Yes, I was.

14 Q What were you doing at approximately eleven o'clock in
15 the morning?

16 A Waiting on a customer at the auto window.

17 Q Would you please explain to the Court what occurred at
18 approximately eleven o'clock, if anything?

19 A Well, there was -- do you want me to go into detail?

20 Q Yes.

21 A I heard a loud bang, I turned, because where I am seated
22 my back is to the lobby, and I turned and there was a
23 man jumping over the counter, and when he landed on his
24 feet he was pointing a gun, and he walked over to me and
25 said this was a holdup. He grabbed my left leg and pulled

1 me up the aisle, and told me to sit on the floor, and
2 I did that, and he told me to face the wall and sit on
3 the floor.

4 Q Now, you say you heard a loud bang, do you know what the
5 bang was?

6 A Yes. I am ordinarily teller number 5, I was relieving
7 the girl at the auto window, and the board was up be-
8 cause the cage was closed, and the board is wooden, it
9 was knocked down on the counter with such a force that
10 it made an extremely loud noise.

11 Q That was what caused you to turn around?

12 A Yes.

13 Q Now, the person that you saw first, he jumped over the
14 counter, how far away was he when you first saw him?

15 A I'm not very good with feet and things --

16 THE COURT: Can you point out anything in the courtroom?

17 THE WITNESS: Yes. I was standing here, it would have been
18 probably about the middle of that table, the
19 end of the table.

20 BY MR. HOULIHAN:

21 Q About this distance?

22 A Yes.

23 Q Now, do you wear glasses?

24 A No.

25 Q And did you have an opportunity to observe him at that

1 time?

2 A Yes, I did.

3 Q And did you recognize him?

4 A Well, actually I thought it was one of our customers --

5 MR. KREMER: Objection, your Honor. The question was,
6 "Did you recognize him?" The answer should
7 be yes or no.

8 THE COURT: That is right.

9 BY MR. HOULIHAN:

10 Q Would you tell us, Mrs. Vickers --

11 A If this will help --

12 THE COURT: Wait for the question.

13 BY MR. HOULIHAN:

14 Q At the time that you first saw him, how close were you
15 looking at him?

16 A Well, very closely. I mean he was flying over the
17 counter, and I started to say, "Ray, what are you doing?"

18 Q You say you started to say, "Ray, what are you doing?"

19 A Yes.

20 Q Why were you going to say that?

21 A Because I thought it was a customer that I wait on every
22 week, and when he landed with the gun he was about two
23 feet shorter than the man I thought he was, and he just
24 proceeded to come at me with the gun.

25 MR. KREMER: Your Honor, again the lady is going to have

1 to be responsive to the question.

2 MR. HOULIHAN: If the Court please, with regard to responsive-
3 ness, I suggest to the Court that the failure
4 to respond to the question, that is an ob-
5 jection reserved to the person who asked the
6 question. I have done some research on it,
7 and I have a xeroxed copy of that --

8 THE COURT: This may be true, except that the opposition,
9 the opposing attorney has the right to know
10 what type of answer is called for by a question
11 so that he can timely make an objection to
12 it before the answer is given. Consequently,
13 if the answer is not going to be responsive
14 to the question, there is going to be a de-
15 parture, the two are not going to correlate.
16 The defense attorney in this situation has
17 no shield, procedural shield by way of ob-
18 jection that he can put up in a timely fashion
19 to save the answer from being given.

20 MR. HOULIHAN: Your Honor, the fact is that his objection
21 that there was a failure to respond was made
22 after the answer was given.

23 THE COURT: Probably his objection ought to be couched
24 more in a motion to strike. If the jury were
25 here then I could strike a non-responsive

1 answer.

2 BY MR. HOULIHAN:

3 Q Mrs. Vickers -- I am sorry -- may I have the last
4 question?

5
6 (Thereupon, the last question and answer
7 was read by reporter.)

8
9 THE COURT: Mrs. Vickers, pay attention to the questions
10 and just answer them. You can see in that
11 situation you answered the question, namely,
12 telling us why you said what you said, but
13 then you went on beyond that saying that
14 when he landed you saw that he was shorter,
15 which has nothing to do with the question.

16 BY MR. HOULIHAN:

17 Q Was he the same person that you had dealt with previously?

18 A No, he wasn't.

19 Q How do you know that?

20 A He was shorter.

21 Q Now, as I understand your testimony, the first time you
22 saw him he was approximately this distance that we are
23 talking about, the end of counsel table, and what did he
24 do after you first saw him?

25 A He approached me with the gun. He was crouched down and

1 he approached me and grabbed my leg and pulled me up
2 the aisle.

3 Q He walked the distance from where I am now to where you
4 are seated?

5 A Yes.

6 Q And what were you doing during this period of time?

7 A I was just standing there, looking at him.

8 Q How was the lighting in that area of the bank?

9 A The bank is well lighted, it has to be.

10 MR. KREMER: Objection. I ask that "it has to be" be
11 stricken.

12 THE COURT: You have shingled off the roof a bit, you
13 don't need "it has to be."

14 BY MR. HOULIHAN:

15 Q It is well lighted?

16 A Yes.

17 Q And so you observed him walking toward you and then you
18 say he grabbed your leg?

19 A Yes.

20 Q Okay. Now, in relationship to your eyes, where was his
21 face at the time he grabbed your leg?

22 A An arm's length away.

23 Q An arm's length away?

24 A Yes.

25 Q And in terms of height, in relationship to your eyes,

1 where was his face?

2 A. He was in a crouched position, and I would say I was
3 looking down at him. Just what do you want, how many
4 inches or feet?

5 Q. You can describe it with your hands if you want. About
6 how far down was he from you?

7 A. His head was about the level of my chest.

8 Q. That would be about a foot lower?

9 A. Yes.

10 Q. As he was pulling you back by the leg, where was he
11 looking?

12 A. At me.

13 Q. Directly in your face?

14 A. Yes.

15 Q. And what were you doing?

16 A. Looking directly in his face.

17 Q. Now, you say he dragged you, how far did he drag you?

18 A. From where I am now to about just behind the partition
19 there.

20 Q. Behind the railing?

21 A. Yes.

22 Q. This would be back here?

23 A. Right.

24 Q. Now, during the period of time that he was dragging you
25 by the leg to the distance beyond the railing back there,

1 what were you doing?

2 A I was looking at him.

3 Q What was he doing?

4 A Looking at me.

5 Q Now, during the period that you have just described about
6 your observing this person, did you make any observations
7 with regard to his hair?

8 A Yes, it seemed as though --

9 MR. KREMER: Objection.

10 THE COURT: Overruled.

11 MR. KREMER: Thank you, your Honor.

12 BY MR. HOULIHAN:

13 Q You may answer.

14 A It seemed to me it was a wig.

15 Q Why do you say that?

16 MR. KREMER: I'm sorry.

17 THE COURT: She said it seemed to her to be a wig.

18 THE WITNESS: It could have been just straightened and rolled.
19 It seemed to me very shiny and very, very black.
20 Very glossy and shiny.

21 BY MR. HOULIHAN:

22 Q Now, Mrs. Vickers, do you have any black friends?

23 A Yes.

24 Q And would you characterize your friendship with blacks
25 as having a lot of black friends?

1 A Yes, I do.

2 MR. KREMER: Objection, relevance.

3 THE COURT: Overruled, since we are without the jury.

4 BY MR. HOULIHAN:

5 Q And in the course of your friendship with black people,
6 have you had occasion to deal with hair of blacks?

7 A Yes, I have.

8 Q In what fashion?

9 MR. KREMER: Objection, your Honor, competency.

10 THE COURT: Overruled for the same reason.

11 MR. KREMER: Thank you, your Honor.

12 THE WITNESS: Can I answer?

13 BY MR. HOULIHAN:

14 Q Yes.

15 A Well, I have rolled it, I have corn braided it, and I
16 have also rolled their hair in rollers.

17 Q Now, the period of time that you first saw the individual
18 when he leaped over the counter and he was this distance
19 away, and he walked to you and grabbed your leg and
20 dragged you back the distance behind the partition,
21 approximately how long, in terms of minutes, did you have
22 an opportunity to look at him?

23 A Well, timing is kind of hard to say exactly. I would
24 say probably a good minute, possibly longer than that,
25 because I was hopping back on one foot on the return

1 trip.

2 Q Now, sometime following the bank robbery you went down
3 to the Rochester Police Department, is that correct?

4 A Yes.

5 Q And were you shown any books?

6 A Yes.

7 Q And what were the books?

8 A The only thing I can call them is mug shots.

9 Q Okay. Approximately how many mug shots were you shown?

10 A Oh, I couldn't tell you. We were in there from probably
11 about twelve to six.

12 Q And during that whole period of time you were looking
13 at mug shots?

14 A Well, I would say at least half of that time, at least
15 half of that time.

16 Q And while looking at the mug shots did you identify any
17 photographs.

18 Q No.

19 Q And what were you asked to do when you were looking at
20 these mug shots?

21 A If I could identify any of them. They asked me to look
22 through them and if I saw anyone that I could recognize
23 as being in the bank at the time of the robbery, put it
24 aside.

25 Q You did not recognize anybody?

1 A. No.

2 Q Now, sometime after that you testified at a preliminary
3 hearing, is that correct?

4 A. Yes.

5 Q And you were in court when there was a judge there, and
6 you were asked questions by a district attorney?

7 A. Yes.

8 Q At that time were you asked to identify anyone in the
9 courtroom?

10 A. Yes, I was.

11 Q Would you please tell the Court what occurred on that
12 day?

13 A. I was asked if I could identify anyone in the courtroom
14 and, to the best of my knowledge, I said that I could
15 not.

16 Q Could not?

17 A. Could not, and then they asked if I could identify the
18 man at the defense table, and I told him that he had the
19 same physical features but that I could not be one hundred
20 per cent sure that it was definitely that person that
21 was in the bank robbery.

22 Q Okay. Did you give any reason -- or what is the reason
23 that you could not be definitely sure?

24 A. Well, during the robbery he was wearing what I assume was
25 a wig. His hair was kind of puffy around his face. He

1 had sunglasses, he had hair on his chin I believe, and
2 at the time that I saw him in the hearing he had no hair
3 on his face and his hair was corn rolled very tightly
4 to his head so that his bone structure looked more --
5 more obvious like, it seemed like his facial appearance
6 was different somewhat, just enough so that I could not
7 say one hundred per cent that was definitely him.

8 Q Now, when you say you couldn't say whether it was defin-
9 itely him, what do you mean by that?

10 MR. KIRMER: Objection.

11 THE COURT: Overruled.

12 THE WITNESS: Well, I just felt that if I could not say yes,
13 that is definitely the man that approached me
14 with the gun during the bank robbery, that I
15 just couldn't say yes to a maybe.

16 BY MR. HOULIHAN:

17 Q So is it fair to say that at that time you were not one
18 hundred per cent sure?

19 A Yes.

20 Q Therefore you did not want to make an identification?

21 A I didn't feel I could honestly make an identification.

22 Q By that did you mean that you did not recognize any of
23 the features of the individual?

24 A No, I don't mean that at all. He was sitting, I only
25 saw the top portion of his body. He was the physical

1 size of the person that approached me and some of his
2 facial features were the same but -- and there wasn't --
3 I think it was because of the hair and the features
4 being more obvious with it pulled back, and I just
5 couldn't say one hundred per cent yes.

6 Q Sometime after that you appeared at a grand jury session,
7 is that right?

8 A Yes.

9 Q Now, during the grand jury proceedings, as I understand
10 it, you were shown surveillance photographs?

11 A Yes.

12 Q During the course of the bank robbery?

13 A Yes.

14 Q And then were you shown any other pictures?

15 A Yes, I was.

16 Q Okay. Would you explain to the Court what happened in
17 relationship to any photographs you were shown after you
18 were shown the surveillance photographs?

19 A They showed me a picture and said it was taken the night
20 he was arrested and could I identify the picture as
21 being the man who approached me during the robbery, and
22 when he showed it to me I just went, "Oh, my God, that
23 is him."

24 Q So this response was immediately after he showed it to
25 you?

1 A. Yes, it was.

2 Q. And did he show you any other photographs at that time,
3 other than the surveillance photographs taken by the
4 bank camera?

5 A. No.

6 Q. Now, subsequent to that time were you shown any photo-
7 graphs by any police agencies at all in connection with
8 this case?

9 A. You mean ---

10 Q. After the grand jury.

11 A. After the grand jury, will you say that again?

12 Q. Okay. After you appeared before the grand jury, and
13 prior to yesterday afternoon, were you shown any photo-
14 graphs by any police department or anybody in connection
15 with this case?

16 A. No, I wasn't.

17 Q. Okay. Now, yesterday you were shown a group of photo-
18 graphs?

19 A. Yes.

20 Q. And approximately how many photographs were you shown?

21 A. I didn't count them, but I would say probably a dozen.

22 Q. And did you make a selection of a photograph?

23 A. Yes, I did.

24 Q. Okay. On what basis did you make that selection, what
25 were you asked to do?

1 A. I was just asked if I could identify the man that came
2 at me during the bank robbery, was his pictures among
3 these.

4 Q. And did you choose a photograph?

5 A. Yes, I did.

6 Q. And this was done by Mr. Jacobson?

7 A. Yes.

8 Q. Now, the photograph that you selected, was there any
9 similarity between that photograph and the photograph
10 you were shown in the grand jury?

11 A. No, there wasn't.

12 Q. Do you recall what the photograph was in the grand jury?

13 A. I don't remember. It seemed like it was in -- it seemed
14 like there was some color to it, some kind of a back-
15 ground color. I don't really remember. I remember
16 it was a head shot, probably from here up, and it just
17 seemed like it was in color. It was like a wallet size
18 picture, just that size.

19 Q. It wasn't a mug shot?

20 A. No, it wasn't a mug shot.

21 Q. Mrs. Vickers, I ask you to look around the courtroom, and
22 would you advise the Court whether you can determine
23 anyone in this courtroom as the person you observed at
24 the bank on June 20, 1975?

25 A. Yes, I can.

1 Q And where is that person seated?

2 A Over there.

3 Q And would you please describe what he is wearing?

4 A Wearing a yellow shirt.

5 MR. HOULIHAN: For the record, identifying the defendant.

6 MR. KREMER: Your Honor, I object to my adversary's last
7 statement. She has physically pointed out
8 a man by the name of Bryant, Mr. Bryant, the
9 defendant. The word "identification" is an
10 ultimate fact.

11 THE COURT: Well, semantics I think. It's all right,
12 overruled.

13 BY MR. HOULIHAN:

14 Q Mrs. Vickers, is your identification of this individual
15 in the courtroom based upon your recollection of the
16 person that you saw in the bank on June 20, 1975 or
17 based upon a photograph that you saw at any time?

18 A Based upon June 20, 1975.

19 MR. HOULIHAN: If the Court please, I have marked Government's
20 Exhibit 34. I have a copy, I don't have a
21 copy of this yet, but I would supply that
22 to the Court with the exhibits that are in
23 the interim. This is my copy at this point.

24 THE COURT: Government's Exhibit 34 is a 302 apparently?

25 MR. HOULIHAN: Of Donna Vickers, yes.

1 BY MR. HOULIHAN:

2 Q At the time or subsequent to the bank robbery, were you
3 questioned by an FBI agent?

4 A You mean the same day?

5 Q The same day.

6 A I was questioned by -- I am sure -- it seemed like --
7 yes, I'm pretty sure I was.

8 Q Did you give a description at that time?

9 A Yes, I did.

10 Q And do you recall what description you gave at that time?

11 A Yes. I believe it was he was about five six or five
12 seven, approximately one hundred twenty-five to one
13 hundred thirty pounds.

14 Q Do you recall any further description that you gave?

15 A Yes, I told them that he was wearing dark pants, I pre-
16 sumed they were jeans, and they were a dark blue, and a
17 lighter blue shirt, and he had sunglasses and a gun.

18 Q Do you recall any other identification that you gave?

19 A Not offhand.

20 Q I show you Government's Exhibit 34 marked for identifica-
21 tion, and I ask you to read to yourself that paper.

22 A Oh, yes, his age. Yes.

23 Q Have you read it?

24 A Yes.

25 Q Does that refresh your recollection as to any informa-

1 lien you gave the FBI at that time?

2 A. Yes, in reference to his age.

3 Q. How about his haircut and whether or not he was shaven?

4 A. Yes, that also.

5 Q. Would you tell us what you told the FBI at that time?

6 A. I told them his height -- do you want me to go through
7 the whole thing?

8 THE COURT: No.

9 BY MR. HOULIHAN:

10 Q. Just with regard to the haircut and the presence or
11 absence of facial hair.

12 Q. I told them that he had hair on his face, that he --
13 I don't remember describing it as a medium bush, that
14 is possibly what I said -- and his age was approximately
15 twenty-eight to thirty.

16 MR. HOULIHAN: I have no further questions at this time.

17 MR. KREMER: Your Honor, prior to cross-examination I
18 would move to strike the identification with-
19 out even going into cross-examination, just
20 on the strength of the fact that my client
21 was displayed to Mrs. Vickers at the prelim-
22 inary hearing, that she was shown one colored
23 photograph at the grand jury, and the district
24 attorney in-effect advised her that this was
25 the photograph of the man who was arrested

1 at the -- the man after he was arrested, plus
2 when she was given an opportunity -- afforded
3 an opportunity at a preliminary hearing in
4 the City Court of Rochester and, for whatever
5 reason, I respect the lady's judgment, she
6 was unable to come up with a positive identi-
7 fication. I will go into the cross-examina-
8 tion if the motion is denied, but I would
9 submit, sir, that it is not necessary.

10 MR. HOULIHAN: If the Court please, may I be heard on that?

11 THE COURT: Well, there is no necessity. No, I am suf-
12 ficiently impressed by the reliability of Mrs.
13 Vicker's in-court identification of the de-
14 fendant to allow it to go to the jury, and
15 in that connection, her hesitancy or reticence
16 on an earlier occasion to make a positive
17 identification, and her indication that she
18 wanted to be sure, she did not want to come
19 out flying wildly and making some identifica-
20 tion, underscores the reliability of her
21 identification today. Now, as far as the
22 single photograph that was shown to her in
23 the grand jury, and whatever was said there,
24 we have again her statement that immediately
25 she said, "Oh, my God, that is the man."

1 In other words, an immediate reaction, which
2 again bespeaks of the reliability. So there
3 is nothing that comes from the photograph,
4 and she said today that her identification
5 of the defendant in court as being the man
6 who was face to face with her in the bank
7 during the time of the robbery, and who dragged
8 her by her left leg, was the defendant is
9 based upon her recollection from June 20, 1975.

10 MR. KREMER:

If the Court please, the preliminary hearing
11 was had on June 25, 1975, and at that time
12 the Monroe County District Attorney asked
13 her the question with respect to identifica-
14 tion, and it would seem immediately at that
15 point that her recollection would be the
16 freshest. The grand jury didn't take place
17 until some later point.

18 THE COURT:

I am completely aware of that, but obviously
19 the jury will have to deal then with the
20 sufficiency of her identification, the cred-
21 ibility of it, the weight to be given to it.

22 MR. KREMER:

I respectfully except, your Honor, and I state
23 for the record that my client has been denied
24 due process under the Fourteenth Amendment.
25 I take exception to the Court's ruling.

H. T. Noel & E. F. Knisley

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WESTERN DISTRICT OF NEW YORK

1 THE COURT: All right.

2 MR. KREMER: Your Honor, my adversary has just brought to

3 my attention the fact that I am not cross-

4 examining the witness at this particular time.

5 I am assuming --

6 THE COURT: That is completely within your right. Cer-

7 tainly there is no compulsion upon you to do

8 it.

9 MR. KREMER: Well, in view of the Court's decision dealing

10 with the reliability, it would seem that

11 cross-examination would be futility at this

12 point.

13 THE COURT: You made your motion prior to any cross-

14 examination. So, of course, I did not have

15 the benefit of anything you might bring out

16 in cross-examination in making my ruling.

17 Now, you can still decide whether to cross-

18 examine or not.

19 MR. KREMER: I will cross-examine, your Honor.

20

21 CROSS-EXAMINATION BY MR. KREMER:

22 Q You testified that when you first became aware of the

23 events of June 20 that your attention was first directed

24 to them by a loud noise, is that correct?

25 A Yes.

1 Q You were doing something else, and presumably you heard
2 the loud noise?

3 A Yes.

4 Q Is it fair to say that that loud noise startled you?

5 A Yes, it is.

6 Q You looked up and saw an individual coming toward you,
7 is that correct?

8 A I looked up and saw him jumping over the counter. He
9 was in the air when I saw him.

10 Q You saw him coming toward you, you said he was in the
11 air, is it my understanding that he was approximately
12 this far from you as he was jumping over the counter?

13 A Yes.

14 Q You were indicating a distance of approximately twenty-
15 five feet then?

16 A I'm no good at measurements.

17 MR. KISSER: Would the Court take judicial notice that
18 where I am standing is --

19 THE COURT: I see that Judge Burke has notations here
20 saying the jury box is nineteen feet long,
21 you can approximate from that, the point you
22 were at is approximately two feet from the
23 end of the jury box, and I assume Mrs. Vickers
24 sits about six feet more from this end of the
25 jury box, so seven ten, twenty-five, twenty-

six feet.

BY MR. KREMER:

Q Now, you testified that you were the teller at cage 5, is that correct?

A No. I said I was teller number 5, however, during --

Q Excuse me. You were the teller at cage 5, correct, that was your job?

A Yes.

Q Now, at that particular time that you heard the noise you were not in cage 5, is that correct?

A Correct.

Q And you were approximately twenty-five feet away from cage 5?

A Yes.

Q And were you in the teller cage section?

A Of the auto window, yes.

Q Of the auto window. So that your view of the person jumping over the counter was not a head-on view, is that correct?

A Well --

Q You said you saw a person jumping over teller cage 5?

A Yes.

Q You were not looking at that person face on?

A Not during the time he was in the air.

Q Not during the time he was in the air. So that while

1 he was in the air you saw a side profile?

2 A. No, no, I saw a front face.

3 Q. Even though you were standing perpendicular to the side?

4 A. He was jumping sideways, he didn't jump straight over.

5 Q. You said before that you started to say the words, 'Hey,
6 Ray,' or something to that effect, a person by the name
7 of Ray?

8 A. Yes.

9 Q. Do you recall at this time what Ray's last name is?

10 A. Yes.

11 Q. What is Ray's last name?

12 A. Reeves.

13 Q. And Ray Reeves, I take it, is a black man?

14 A. Yes.

15 Q. So that at that particular time then you were under the
16 impression that a man by the name of Ray Reeves was
17 coming over the tellers cage?

18 A. Yes.

19 Q. You saw the gun in this person who you thought was Ray
20 Reeves' hand?

21 A. I didn't see the gun until he landed.

22 Q. You didn't see the gun until he landed. At the time that
23 he landed you still thought it was Ray Reeves, correct?

24 A. No.

25 Q. In other words, your testimony now is that when he landed

1 on the tellers side of cage 5 that at that point you
2 thought that he was not Ray Reeves, is that correct?

3 A. Yes.

4 Q. It is your testimony that this man then started coming
5 toward you?

6 A. Yes.

7 Q. He then grabbed your leg, is that correct?

8 A. Yes.

9 Q. It is your testimony that he dragged you, and you pointed
10 to an area back here by the rail, beyond the rail, he
11 dragged you that distance?

12 A. Just beyond the rail, yes.

13 Q. Just beyond the rail. I am standing now approximately,
14 oh, four feet beyond the rail, would it be this distance
15 or even further?

16 A. It would be a little closer.

17 Q. A little closer. About here?

18 A. Yes.

19 MR. KREMER: Are there some measurements of this, your
20 Honor, the distance of the rail?

21 THE COURT: Not in front of me. Anybody could make them.

22 BY MR. KREMER:

23 Q. If where I stood before was about twenty-five feet, Mrs.
24 Vickers, you would have to conclude that the distance
25 where I was standing just a few seconds ago would be at

1 least thirty, thirty-five feet?

2 A. Yes.

3 Q. It could be a little more, but thirty, thirty-five feet
4 at least?

5 A. Yes.

6 Q. It is your testimony that he dragged you that particular
7 distance?

8 A. Yes.

9 Q. And which of your legs, if you remember, had he grabbed?

10 A. The left one.

11 Q. The left one. And you were on your back as you were
12 being grabbed?

13 A. No.

14 Q. You were on your stomach?

15 A. No, I was hopping on one foot.

16 Q. You were hopping on one foot, and there was all sorts
17 of other activity going on in the bank at this time that
18 you were being dragged by your foot?

19 A. I don't really remember. I mean --

20 Q. You don't really remember?

21 A. No.

22 Q. Do you remember hearing any noises about, 'This is a
23 bank robbery?'

24 A. He did say that when he -- just before he grabbed my
25 leg.

1 Q Do you recall hearing anybody else say that?

2 A During the time he was dragging me, no.

3 Q And it is your testimony that the whole process from
4 when he laped over the counter until he finished drag-
5 ging you lasted approximately ninety seconds?

6 A I think that is fair.

7 Q All right.

8 A Kind of hard to tell.

9 Q What did you observe him do after he let you go?

10 A I didn't observe him do anything after he let me go.
11 It seems that when he was pulling me up the aisle, at
12 some point -- it's not real clear -- he picked up a
13 bag off the floor, a white bag. I didn't see him do
14 anything else.

15 Q It is your testimony that during the entire time that
16 he was back there, with the exception of picking up
17 a bag, he was occupied solely with jumping over the
18 counter and dragging you a distance of some thirty odd
19 feet, correct?

20 A Yes.

21 Q Now, you have indicated in your 302 statement, which
22 Mr. Houlihan showed to you, Government's Exhibit 34,
23 you indicated on there that you -- that the description
24 that you gave the police was a man twenty-eight to thirty
25 years of age, five foot six to five foot eight?

- 1 A. Yes.
- 2 Q. He weighed one hundred and forty pounds, and he had a
- 3 medium bush haircut?
- 4 A. Yes.
- 5 Q. And that he was unshaven?
- 6 A. Yes.
- 7 Q. You did not describe a goatee or a beard, did you, you
- 8 didn't use those words?
- 9 A. Actually the words I used was he had hair on his face.
- 10 Q. I see. In other words then the special agent who took
- 11 this statement from you misinterpreted or misunderstood
- 12 what you told him, is that correct?
- 13 A. Well, if he had hair on his face he would be unshaven.
- 14 Q. The description that you have given here is unshaven,
- 15 correct, the word "unshaven" appears in that form, doesn't
- 16 it?
- 17 A. Yes, it does.
- 18 Q. All right. And there are no words "goatee" or "beard"
- 19 used there?
- 20 A. No.
- 21 Q. And there is nothing about a wig there, is there?
- 22 A. No.
- 23 Q. Nothing about shiny hair, is there?
- 24 A. No.
- 25 Q. So these are all descriptions which were given at some

1 point other than on June 20, 1975, isn't that correct?

2 A. No, it is not correct.

3 Q. It is not correct, all right. In any event, these
4 descriptions were not given to Special Agent Carney on
5 June 20, 1975, is that correct?

6 A. Okay, they were not given to him.

7 Q. Now, when Special Agent Carney spoke to you, he told
8 you he wanted a description, is that not correct?

9 A. Most likely that is what he said. It is hard to remember
10 word for word exactly.

11 Q. He did not push you or force you into giving a description?

12 A. No.

13 Q. He solicited your cooperation?

14 A. Yes. I believe this was also immediately after the
15 robbery, you know.

16 Q. There never came a time when you went back to Special
17 Agent Carney and said, 'Gee, I want to change my
18 description around, I actually wanted to describe other
19 features like shiny hair or goatee or beard,' you never
20 did that?

21 A. No, because I was taken right down to the police station.

22 Q. Now, there came a time when you went to the Rochester --
23 you mentioned that when you thought it was Ray, you first
24 thought it was Ray, the thing that gave you the tip-
25 off that it wasn't Ray that somebody was two feet shorter?

1 A. Yes.

2 Q. Is Ray two feet shorter than --

3 A. No.

4 Q. The man who jumped over the cage was two feet shorter
5 than Ray?

6 A. Yes.

7 Q. You had an opportunity to observe the man who you sub-
8 sequently identified -- strike that. Did you have an
9 opportunity to -- all during the time when this person
10 you thought was Ray was coming toward you -- excuse me,
11 strike that. Your Honor, may I have a moment, please?

12 THE COURT: Certainly.

13 BY MR. KRLNER:

14 Q. Now, you indicated that the man who jumped over the
15 tellers cage was at alternate times crouched down, is
16 that not correct?

17 A. Yes.

18 Q. Was he -- you say he was dragging you, is that not cor-
19 rect?

20 A. He was pulling me.

21 Q. He was crouched down and pulling you at the same time?

22 A. Yes.

23 Q. And it is your testimony that you had to look down at
24 him?

25 A. To a certain extent, yes.

1 Q All right. Now, of course, all during the time that
2 was going on you were nervous, weren't you?

3 A That is hard to answer.

4 Q You were upset, weren't you?

5 A I was kind of -- I didn't really get nervous and upset
6 until he left. I was just -- I don't know how to ex-
7 plain it -- I was kind of --

8 Q You didn't have -- it wasn't a normal situation, was it?

9 A No, it wasn't.

10 Q No. Now, Mrs. Vickers, there came a time on June 25
11 when you were summoned to appear in the preliminary hear-
12 ing, entitled the People of the State of New York versus
13 David Bryant, correct?

14 A Yes.

15 Q You knew that you were coming to testify in a case in-
16 volving the People of the State of New York and David
17 Bryant, correct?

18 A Yes.

19 Q And you were told, were you not, that this was one of
20 the alleged bank robbers?

21 A No, I wasn't.

22 Q You were not told that?

23 A No.

24 Q You didn't have any conference with Mr. Infantino, the
25 assistant district attorney, about this case prior to

1 testifying?

2 A. Yes, I did.

3 Q. Mr. Infantino told you something about the reason for
4 your being in the Public Safety Building?

5 A. He told me he was arrested for the robbery. At no time
6 did he say this was the man who robbed the bank.

7 Q. He told you they had a suspect?

8 A. Yes.

9 Q. They thought the suspect was connected with the bank
10 robbery?

11 A. Yes.

12 Q. They wanted you to give some testimony with respect to
13 this?

14 A. Yes.

15 Q. So you came here and you sat down in a courtroom in the
16 Public Safety Building in Rochester, New York, is that
17 not right?

18 A. Yes.

19 Q. Is it not a fact that David Bryant, who is there in court,
20 was seated fairly close to you?

21 A. I'm sure he was. I really can't remember.

22 Q. He was seated much closer to you, as a matter of fact,
23 than David Bryant is seated close to you in this court,
24 is that not correct? He is farther away from you here
25 today than he was on June 25, 1975?

- 1 A To tell the truth, I don't remember how the courtroom
2 is set up.
- 3 Q You had an opportunity at least to look at David Bryant
4 in court while you were testifying?
- 5 A Yes.
- 6 Q You had a chance to look at him?
- 7 A Yes.
- 8 Q And you knew that he was a suspect in the bank robbery?
- 9 A Yes.
- 10 Q I'm going to show you Page 6 of your preliminary hearing
11 testimony, and I am going to ask you to look at the ques-
12 tions and answers.
- 13 A (Witness examines transcript.)
- 14 Q And do you remember being asked at that particular time,
15 "Can you give me any identifying features?" Do you re-
16 member being asked that?
- 17 A Yes.
- 18 Q Do you remember what your answer was at that particular
19 time?
- 20 A I believe I made some reference to the physical shape
21 of his body from what I could see.
- 22 Q Again showing you this, did you not in fact say, "No,
23 he had ---"
- 24 A Okay, yes. Down here, I see.
- 25 Q What did you describe?

- 1 A. 'do, he had hair on his face and sunglasses on, they
2 were tinted glasses, they weren't really dark."
3 Q. Now, at that time although you have been asked that
4 question, you did not say that the individual was twenty-
5 eight to thirty years of age, did you?
6 A. No.
7 Q. You did not say he was five six to five eight inches
8 tall?
9 A. I wasn't asked those questions.
10 Q. You didn't say that?
11 A. No, I didn't.
12 Q. Again, even though you were asked were there any identify-
13 ing features, you did not describe a medium bush haircut?
14 A. No.
15 Q. You did not make the description as unshaven, did you?
16 A. I didn't use that word, but I did say he had hair on
17 his face.
18 Q. Now then, did there come a time when you looked over at
19 Mr. Bryant, who was present at that preliminary hearing,
20 and as you have indicated before, you did not identify
21 him, correct?
22 A. Yes.
23 Q. Now, you did not testify at that particular time that
24 you were sort of sure, but less than one hundred per cent
25 sure, you did not use that language, did you?

1 A. No.

2 Q. And you did not use the language that you have used here
3 in court today, that his bone structure was more obvious
4 and his facial appearance had some special effect, did
5 you?

6 A. No, I didn't.

7 Q. You didn't comment on any differences in Mr. Bryant as
8 he appeared before the preliminary hearing and the per-
9 son who was at the bank robbery scene?

10 MR. HOULIHAN: Objection. Unless he can show that she was
11 asked those questions, I think it is improper
12 impeachment.

13 THE COURT: The jury isn't here, overruled.

14 BY MR. KREMER:

15 Q. Would you like the question read?

16 A. Yes.

17

18 (Thereupon, the last question was read by
19 reporter.)

20

21 THE WITNESS: No, I didn't.

22 BY MR. KREMER:

23 Q. Now, at that preliminary hearing you were asked to look
24 at a photograph, correct?

25 A. I don't believe so. The preliminary hearing was the

1 first?

2 Q Yes.

3 A Oh, you mean surveillance photographs, yes.

4 Q All right. You were asked to look at a surveillance
5 photo, is that not correct?

6 A Yes.

7 Q Okay. I am going to ask you to look at Pages 7 and 8 of
8 the preliminary hearing examination.

9 A (Witness examines transcript.)

10 Q And Page 9 too, please.

11 A (Witness examines transcript.)

12 Q You described a description of another person who you
13 saw standing out in the lobby, is that not correct?

14 A Yes.

15 Q Do you remember what your description of that individual
16 was?

17 A From the way I described him here, I didn't say all that
18 I had seen, most of it, other than he was husky, he had
19 a husky build, he had an Afro, hair on his face, and
20 then the question, "Did he have any kind of disguise or
21 weapon?" The answer was, "I didn't see that, but he had
22 a stocking over his head."

23 Q All right. So that while this was going on you did have
24 an opportunity to observe other events and other things
25 going on, is that not correct?

1 A. That is the only thing I saw.

2 Q. All right. Now, on Page 8 again, do you recall testify-
3 ing that you were frightened about some of the conversa-
4 tion that you heard?

5 A. Yes, I remember that now.

6 Q. All right. So that at least you became aware of the
7 conversation that was going on while this was taking
8 place?

9 A. Yes.

10 Q. And you said that it frightened you?

11 A. Yes.

12 Q. You also said that you were told to sit down and face
13 the wall, is that not correct?

14 A. Yes.

15 Q. And you sat down and faced the wall?

16 A. Yes.

17 Q. So while that period of time was going on that you were
18 facing the wall, you were not looking at the man who had
19 leaped over the tellers cage?

20 A. That is right.

21 Q. There were at least three incidents or three things that
22 occurred, other than this individual jumping over the
23 tellers cage and dragging you a distance of so many
24 feet, correct? Do you understand the question?

25 A. What three things?

1 Q Well, you heard talking in the lobby?

2 A Yes.

3 Q And you turned and faced the wall?

4 A Yes.

5 Q And you were observing another man in the lobby?

6 A I wasn't observing him, I just caught a glimpse of him.

7 Q Those three things did occur?

8 A Yes.

9 Q Again in your description to Mr. Infantino, the district
10 attorney, on the day that you testified, you did not give
11 him any specific distances as to how far away the person
12 was who leaped over the counter or how far you were
13 dragged?

14 A No, I assumed it was a question and answer, I wasn't
15 asked that question.

16 Q There came a time -- do you remember how long the pre-
17 liminary hearing lasted, this question and answer period?

18 A No, I really don't.

19 Q At least it occupied some time?

20 A Yes.

21 Q Well, it occupied the time that it did, you had ample
22 opportunity -- strike the word "ample" -- you had
23 opportunity to observe the man accused of this crime,
24 David Bryant?

25 A I had the opportunity, yes.

1 to the man named David Bryant, correct?

2 A. Yes, I guess you could say that.

3 Q. And there was some connection in your mind, wasn't there,
4 between this David Bryant and the David Bryant who you
5 had testified about on the preliminary hearing, wasn't
6 there?

7 A. Well, I was there to tell what happened and, you know,
8 whatever recollection I had of the robbery and the man.

9 Q. It was the same David Bryant, correct?

10 A. I'm sure it was.

11 Q. You went into the grand jury and you were shown a picture
12 of an individual who was named as David Bryant, correct?

13 A. That is what they told me, yes.

14 Q. And it was a colored photograph, correct?

15 A. To the best of my recollection, yes.

16 Q. And they asked you if you could identify this man and
17 you said yes?

18 A. Yes.

19 Q. And it was a photograph that you say they said was taken
20 at the time he was arrested, is that correct?

21 A. Yes. I don't know if they told me that during the hear-
22 ing or whatever or afterwards. I don't remember when
23 they told me. That was told to me, yes.

24 Q. They did not tell you when the picture was taken or
25 under what circumstances, other than you were advised

1 it was a post arrest photo, in substance?

2 A Yes.

3 Q You said it was a wallet sized picture, is that correct?

4 A Yes.

5 Q And they gave you a bit of time to look at it, didn't
6 they?

7 A Not really, he just showed it to me and I said, "Oh,
8 my God, that's him." It couldn't have been more than
9 a couple of seconds, if that.

10 Q Then there came a time yesterday afternoon, did there
11 not, when you were in this court awaiting the time to
12 testify?

13 A Right.

14 Q And you had an opportunity to observe Mr. Bryant seated
15 at the counsel table?

16 A Yes.

17 Q Now, looking over at counsel table right now, you see
18 my client, David Bryant, correct?

19 A Yes.

20 Q And you see that is an empty chair next to his?

21 A Yes.

22 Q And when you came into court yesterday it was fairly
23 obvious that this man, David Bryant, is the defendant,
24 is it not?

25 A Yes.

1 Q And when you came into court and saw Mr. Bryant again,
2 it was obvious that he was the defendant, correct?

3 A Yes.

4 Q When you saw him yesterday and when you saw him today,
5 the only other person that you saw at counsel table was
6 myself, correct?

7 A Yes.

8 Q It would be hard to mistake me from Mr. Bryant?

9 A Yes.

10 Q To state the very obvious. Now, you indicated that on
11 the day of the robbery that you observed the person who
12 leaped over the counter was armed with a handgun, is
13 that correct?

14 A Yes.

15 Q You indicated that the handgun was leveled at you, is
16 that not correct?

17 A Yes.

18 Q Is it a fair statement that it was leveled at you at
19 a frighteningly close range?

20 A Yes.

21 Q You were concerned that that handgun would go off, weren't
22 you?

23 A Yes.

24 Q Isn't it a fact that you watched that handgun to see
25 which way it was being leveled, if you recollect?

- 1 A I'm sure I probably looked at it several times, but I
2 really can't remember. I wasn't staring at it.
- 3 Q All right. Now, you indicated that you at some point
4 observed the man who leaped over the counter, you ob-
5 served that he picked up a white bag, is that not cor-
6 rect?
- 7 A Sometime, yes, he did pick up the bag off the floor.
- 8 Q So that with respect to your observation of those events,
9 the handgun and the sack that he picked up, your attention
10 was diverted from his face to those particular items,
11 correct?
- 12 A Partially. I mean if he is dragging me and just reaches
13 down and picks it up, I am not going to still see that
14 without taking my eyes off his face.
- 15 Q It is a fair statement, is it not, that the man who leaped
16 over the counter was not facing you eyeball to eyeball
17 during this ninety seconds or so that you testified to?
- 18 A Not eyeball to eyeball, no.
- 19 Q His attention was directed toward other things, is that
20 right?
- 21 A I really don't know. It seemed like he was looking at me.
- 22 Q It seemed like he was looking at you. Now, you indicated
23 that the man who leaped over the tellers cage had glasses
24 on, correct?
- 25 A Yes.

1 Q They were tinted glasses?

2 A Yes.

3 Q And you could not see the color of the individual's eyes,
4 is that right?

5 A That is correct.

6 Q And you probably couldn't see the individual's eyebrows,
7 could you?

8 A Probably not.

9 Q You would be unable to see the facial muscles within
10 the eye socket as they would move one way or the other?

11 A That is true.

12 Q And you indicated that the person was unshaven, correct?

13 A Yes.

14 Q And is it not a fair statement that your attention was
15 directed to the glasses and to the hair on the face,
16 as contrasted with other facial features?

17 A Yes, I guess so.

18 Q And is it not a fair statement that you would have spent
19 more time observing those things than any other things?

20 A I don't really remember thinking about what I was ob-
21 serving.

22 Q For example, you didn't have an opportunity to observe
23 whether the individual had high cheekbones or low cheek-
24 bones?

25 A No, I don't think that is fair because I knew he had a

1 small nose.

2 Q He had a small nose?

3 A Yes, and from here down I was definitely very clear.

4 Q Of course, again, you did not tell Special Agent Carney
5 or the police or at the preliminary hearing that the
6 man who jumped over the counter had a small nose, you
7 did not say that, did you?

8 A I don't remember if I told anybody that or not. It
9 doesn't appear here.

10 MR. KREMER: Okay, fine. Your Honor, at this time I would
11 ask that my adversary produce the array of
12 photographs that were used yesterday, and I
13 would ask for the production of the photograph
14 that was used in the Monroe County Grand Jury.

15 MR. HOULIHAN: Your Honor, I have Exhibits 37 through 46,
16 which represent the spread of photographs.
17 I have Special Agent Jacobson here ready to
18 testify as to the spread that was shown to
19 Mrs. Vickers. I don't have any photograph
20 from the Monroe Grand Jury.

21 THE COURT: All right. You do have the photographs that
22 were shown to Mrs. Vickers by Mr. Jacobson,
23 and I assume you have now handed them to
24 Mr. Kremer?

25 MR. HOULIHAN: Yes.

1 MR. KREMER: Yes, your Honor, I have them in my hand.
2 Your Honor, I would note for the record that
3 of the exhibits handed to me, seven of them
4 have names on the back of the photographs.
5 I have been handed nine photographs. I am
6 advised that there were twelve photographs.
7 THE COURT: 37 through 46?
8 MR. HOULIHAN: That is all there was.
9 THE COURT: That is ten, isn't it?
10 MR. KREMER: Nine.
11 THE COURT: It is not 37 through 46, what one is missing?
12 MR. HOULIHAN: Right, I skipped a number.
13 MR. KREMER: I have 38 through 46, your Honor.
14 THE COURT: All right.
15 MR. HOULIHAN: I skipped 36, I skipped 37.
16 THE COURT: I interrupted you, you said nine, I thought
17 there were ten. You said there was some
18 writing on the back of some?
19 MR. HOULIHAN: Yes.
20 THE COURT: What else?
21 MR. KREMER: I can go through this with the Court or hand
22 them to the Court.
23 THE COURT: You were making another point, I don't remem-
24 ber what it was.
25 MR. KREMER: Just that there were less than the twelve.

1 THE COURT: All right. Your answer to that, Mr. Houlihan,
2 is that these nine are all that you had?
3 MR. HOULIHAN: These are the nine shown to her. She said
4 she didn't know how many she was shown, she
5 said about twelve, and Special Agent Jacobson
6 is here ready to testify as to what was shown.
7 In regard to the writing on the reverse side,
8 I think that can be cleared up by a question
9 as to whether she was shown the reverse side.

10 BY MR. KREMER:

11 Q Were you shown the reverse side of any of these photo-
12 graphs?

13 A No, I wasn't.

14 Q And you picked out Exhibit No. 38, did you not?

15 A Yes, I did.

16 Q And on Exhibit 38 appears 6/20/75?

17 A Yes, it does.

18 Q Now, taking these exhibits and looking at them, there
19 are three of the nine that have full view, side view
20 and front view, correct?

21 A Yes.

22 Q And the other six merely have side view and front view,
23 correct?

24 A Yes.

25 Q Now, of the full views, each of the full view pictures

1 shows somebody in front of a measuring chart, doesn't it?

2 A. Yes.

3 Q. And Exhibit No. 2 has a man six feet tall, correct?

4 A. Yes.

5 Q. Exhibit 40?

6 A. Correct.

7 Q. Now, Exhibit No. 42 has a man approximately five foot
8 seven, correct, five foot eight?

9 A. Yes.

10 Q. And Exhibit No. 38, the person that you have identified
11 as Mr. Bryant, is less than five foot six inches tall,
12 correct?

13 A. Yes. It is kind of hard to tell but --

14 Q. Okay. Now, with respect to the three exhibits that I
15 have just discussed before, that is, the three containing --
16 the three photographs of suspects, there is a difference
17 in facial coloration to some extent, is there not?

18 A. Yes.

19 Q. And Exhibit No. 38, the Bryant picture, Mr. Bryant's
20 hair is corn rolled, is it not?

21 A. No, it is not corn rolled.

22 Q. How would you describe it, braided?

23 A. Yes, I guess so.

24 Q. There are braids that appear in the picture?

25 A. Yes.

1 Q And with respect to 42 and 43, which are the other
2 three view pictures, these people all have short Afros?
3 A Yes.

4 Q Very short Afros?

5 A Yes.

6 Q At least with respect to hair, there is a tremendous --
7 style that word "tremendous" -- there is a difference
8 between the Bryant photograph and the other two photo-
9 graphs?

10 A Yes.

11 Q Now, were you told by Agent Jacobson when any of these
12 particular pictures were taken?

13 A No, I wasn't.

14 Q Does Exhibit 38 look at all similar, if you can recollect,
15 to the picture -- any of these three pictures look simi-
16 lar to the picture you saw at the grand jury?

17 A Not to my knowledge. It was just a head shot, just from
18 the neck up.

19 Q A colored head shot?

20 A Yes.

21 Q Put your recollection at that point as to what you were
22 shown, other than a color shot of the head and the
23 shoulders, is vague, is that correct?

24 A Yes, that is correct.

25 Q And that you really can't say at this particular time

1 what that picture was or what it looked like when you
2 testified before the grand jury?

3 A. That is correct.

4 Q. Now, with respect to Exhibit No. 10, it shows a fairly
5 young man, doesn't it?

6 A. That is correct, I suppose.

7 Q. And this man in No. 10 is much younger than the Bryant
8 picture, is that not correct?

9 A. It is hard to say really.

10 Q. All right. Do you remember in the sequence where the
11 Bryant picture was when you looked at it, when Mr.
12 Jacobson showed it to you?

13 A. Not exactly, other than it wasn't in the beginning, and
14 it wasn't in the end, somewhere in the middle.

15 Q. All right. And what did Mr. Jacobson tell you what he
16 wanted you to do, he wanted you to look at these pictures?

17 A. Yes.

18 Q. And did he tell you who you were looking for?

19 A. Yes.

20 Q. He said he wanted you to pick out David Bryant?

21 A. No, I don't think he said that. I think he asked me
22 to look at the pictures and see if I could identify any-
23 one.

24 Q. All right. And this took place yesterday?

25 A. Yes.

1 Q And do you recollect what time it was?

2 A It was about two o'clock.

3 Q Did you have an opportunity before this to confer with

4 Mr. Keelin, the United States Attorney, to talk with

5 him about this case?

6 A Yes, I did have.

7 Q Did you have an opportunity to come in to court at about

8 two o'clock, prior to looking these pictures over?

9 A Yes.

10 MR. KENNEDY: Thank you.

11

12 REDIRECT EXAMINATION BY MR. KENNEDY:

13 Q Mrs. Vickery, prior to the time that you were shown the

14 photographs as offered by Special Agent Jacobson, was

15 there any conversation about your desire to look at a

16 spread of photographs, do you recall?

17 A Yes. There was something said about that. I think

18 I said something like I could probably pick it out of

19 an assortment of pictures.

20 Q You said that?

21 A Yes.

22 Q And at that point I said to Mr. Jacobson, "Get a spread

23 of photographs."

24 A Yes.

25 Q And he left me in the courtroom, and then he showed you the

1 spread, and I wasn't present when he showed it to you?

2 A. No, you were not.

3 Q. When you were shown the spread of photographs were you
4 given any particular instructions?

5 A. Just to see if I could identify the man that had approached
6 me in the bank during the robbery.

7 Q. You did choose one photograph?

8 A. Yes, I did.

9 THE COURT: Was there any indication given to you that
10 that man's picture was among those photographs?

11 THE WITNESS: No, not really.

12 BY MR. HOULIHAN:

13 Q. You chose the photograph yesterday, can you show me
14 which one?

15 A. This one.

16 Q. You picked out Government's Exhibit 38, is that right?

17 A. Yes.

18 MR. HOULIHAN: I have no further questions.

19 THE COURT: In court today, Mrs. Vickers, you have pointed
20 out Mr. Bryant as being the individual who
21 was pulling you in the bank. Now, you say
22 that you did that on the basis of your recol-
23 lection of that happened on the day of the
24 robbery?

25 THE WITNESS: Yes.

1 THE COURT: Yesterday you saw photographs, you picked one
2 out as being that same man?

3 THE WITNESS: Yes.

4 THE COURT: Is your identification today based upon seeing
5 that photograph yesterday?

6 THE WITNESS: No.

7 THE COURT: All right.

8

9 RECROSS-EXAMINATION BY MR. KREMER:

10 Q You testified at the preliminary hearing that David
11 Bryant who was there had braided hair, is that correct?

12 A Yes.

13 Q I see.

14 A Not like that, no, no, no.

15 Q You said it was corn braided?

16 A Yes.

17 MR. KREMER: I have no further questions of this witness.

18 THE COURT: All right, thank you.

19

20 (Witness excused.)

21

22 THE COURT: Now, do you want to examine Mr. Jacobson?

23 MR. KREMER: Not with respect to the --

24 THE COURT: Photographs?

25 MR. KREMER: Photographs, if, your Honor.

1 THE COURT: Let's go ahead with the trial.

2 MR. KROGER: I would renew my motion, your Honor.

3 THE COURT: Yes, I see no substantial change in the
4 background of her testimony and consequently
5 would hold to the same ruling.

6

7 (Thereupon, the jury entered the courtroom

8 at 10:55 A.M.)

9

10 H A M I L T O N B R O W N , 440 Thurston Road, Rochester,
11 New York, called as a witness on behalf of the Government,
12 and being first duly sworn, testified as follows:

13 DIRECT EXAMINATION BY MR. HOULTMAN:

14 Q Mrs. Brown, where do you live?

15 A 440 Thurston Road. I previously lived at 62 Roxborough
16 Road. As of now I am living at 440 Thurston Road.

17 Q Who did you live with on Roxborough Road?

18 A My daughter, Dalsenia Abrams.

19 Q I call your attention to the date of June 20, 1975, were
20 you at 62 Roxborough Road on that day?

21 A Yes, I was.

22 Q At around 12:30 that day did anyone come to your house?

23 A Yes, between 12:30, 12:45, something like that.

24 Q And who was that?

25 A Well, there were three young men, and one was my daughter's,

(Thereupon, the conference at the bench
was terminated.)

BY MR. HOULIHAN:

Q Mrs. Vickers, think back now to the date of June 20,
1975. Are you able to now give a description of the
person that you saw on that day that dragged you back?

A Yes.

Q And what is that description?

A He was between five-six and five-eight, about one hundred
thirty, one hundred thirty-five pounds, he had small
features, small facial features --

Q Keep your voice up.

A Okay. That's about it.

Q And did you notice anything -- do you recall anything
concerning his face?

N.B.111 A He just had small features.

Q Do you recall anything about whether he was clean shaven?

MR. KREMER: Objection.

THE COURT: Sustained.

MR. KREMER: It is a leading and suggestive question.

THE COURT: Sustained.

MR. KREMER: Thank you, your Honor.

BY MR. HOULIHAN:

Q Other than the features, other than the fact that you

1 es he?

2 A. No.
DEFENDANT'S CROSS EXAMINATION

3 Q. Of course, he is white, isn't he?

4 A. Yes.

5 Q. And you testified in your examination that when you first
6 took a look at him, you saw him coming over the counter,
7 you said you saw him, and he's name was Ray?

8 A. Yes.

9 Q. And that was the first time was?

10 A. Yes.

11 Q. And you say that Ray was associated with the Lincoln
12 Street people for a good period of time?

13 A. As long as I have been there.

14 Q. About a year and a half?

15 A. Three years.

16 Q. You saw him every week?

17 A. Yes.

18 Q. And he had a couple of accounts or one account, do you
19 remember?

20 A. I don't remember.

21 Q. Did he have a car at that time?

22 A. Yes.

23 Q. And that is the person who you first thought was coming
24 over the road to that car?

25 A. Yes.

1 Q And in that split second before you realized it wasn't
2 him, did you have a flash that it was a man who you
3 had been banking with over the past couple of years --
4 A Yes, sir.
5 Q Did you know him at that time?
6 A Yes, sir.
7 Q How well did you know him? Did you know him so well
8 that you would be capable of robbing your bank?
9 A Yes, sir.
10 Q Did you ever get along with black people before?
11 A Yes, sir.
12 Q And you, of course, have no prejudice against black
13 people?
14 A Yes, sir.
15 Q And you, Mr. Jones, what was the gentleman's last name?
16 A Brown.
17 Q Mr. Brown, approximately -- stated approximately
18 how tall?
19 A I would say about six-foot.
20 Q And how heavy is he, Reeves would you say?
21 A About 150 pounds.
22 Q Did he have any hair on his face?
23 A I don't recall.
24 Q Did he have any hair on his head?
25 A Yes, sir.

1 Q You still see him on a weekly basis?

2 A Yes.

3 Q Does he have hair on his face now, do you know?

4 A I don't. I didn't pay any attention to it.

5 Q I see. Now, this was a frightening experience, wasn't
6 it?

7 A Yes.

8 Q You fortunately have never been in this kind of an ex-
9 perience before, have you?

10 A No.

11 Q Certainly it is not an experience that you hope you will
12 ever have to repeat?

13 A Right.

14 Q And you testified that the man who jumped over the
15 counter told you this was a bank robbery?

16 A Yes.

17 Q And you have had special training from the bank with
18 respect to bank robberies, haven't you?

19 A Oh, yes, but you never know how you are going to react.

20 Q And there is always the possibility that something dread-
21 ful can happen during a bank robbery, as far as your
22 own personal security is concerned?

23 A Yes.

24 Q And at the time that this incident occurred did you have
25 any people dependent upon you?

1 Q And you were observing the person out in the lobby?

2 A No, I wasn't observing him, I just had a quick glance
3 at him.

4 Q And of course, during a time like this, and I don't mean
5 to insult your intelligence, obviously you did not have
6 a stop watch to time every sequence of the events?

7 A No.

8 Q No, of course not. Now, you indicated that -- before
9 you were interrupted -- you indicated that there came
10 a time when you gave a description of the person who
11 jumped over the cage to the FBI?

12 A Yes.

13 Q I'm going to show you Government's Exhibit 34, a copy
N.B.111 of it, and ask you to take a look at that description.

15 A (Witness examines document.)

16 Q Now, in there you described the age of the person who
17 leaped over tellers cage number 5 as being between
18 twenty-eight and thirty?

19 A Yes.

20 Q And you described also that -- you didn't mention any-
21 thing about a wig in that description that you gave the
22 FBI, did you?

23 A No.

24 Q And you used a different terminology, as a matter of fact.
25 Can you tell us what terminology you used with respect

1 to that person's hair?

2 A I said there a medium bush haircut.

3 Q A medium bush haircut, and there is nothing in there
4 N.B.!!! about small facial features, is there?

5 A No.

6 Q And you used the term "unshaven," is that correct, in
7 that description to the FBI?

8 A Well, I don't remember using that word. Maybe that is
9 the terminology.

10 Q But the word "unshaven" appears in the report which is
11 Government's Exhibit 34, correct?

12 A Yes.

13 Q So that if you did not say it, then somehow that word
14 appeared through some operation, correct?

15 A Yes.

16 Q And there is no description there, "He had hair on his
17 face," is there?

18 A No, but I'm sure that's what I said.

19 Q Now, there is nothing in the report there in which you
20 N.B.!!! say, 'Another teller and I were sitting there holding
21 one another,' that doesn't appear there?

22 A Not in this one, no.

23 Q Not in this one, all right. Now, these are all events
24 which took place on June 20, is that correct?

25 A Yes.

1 comparison there?

2 A No, sir.

3 MR. KREMER: Thank you, sir. I have no further questions.

4 MR. HOULIHAN: I have no questions.

5 THE COURT: Thank you, Mr. Praysier.

6

7 (Witness excused.)

8

9 MR. HOULIHAN: The Government calls Judy Tripp.

10

11 J U D Y T R I P P , 34 Derringer Place, Rochester,
12 New York, called as a witness on behalf of the Government,
13 and being first duly sworn, testified as follows:

14 DIRECT EXAMINATION BY MR. HOULIHAN:

15 Q Mrs. Tripp, by whom are you employed?

16 A I am employed by the Rochester Police Department.

17 Q And how long have you worked for the police department?

18 A A little over two years.

19 Q And in what department are you employed?

20 A Criminal Records Division.

21 Q And in the course of -- what types of records are kept
22 at the unit that you work at?

23 MR. KREMER: I object to this point to the use of certain
24 adjectives which the lady referred to. May
25 I approach the bench to fully state the basis?

(Thereupon, the following conference ensued at the bench:

MR. KREMER: I am specifically objecting to the words "criminal records." "Criminal" is a perfectly dreadful rating. They keep records, but I think if she is going to keep saying, 'We keep criminal records -- "

THE COURT: Well, from this point on call it the Record Division. I'll tell the jury that the word "criminal" means nothing, as far as it attaching any criminality to Mr. Bryant or any of the records she's going to speak about.

MR. KREMER: Thank you, your Honor.

(Thereupon, the conference at the bench was terminated.)

THE COURT: The fact is, ladies and gentlemen, that the division or part of the Rochester Police Department in which Mrs. Tripp is employed is called the Criminal Records Department is not to carry with it any connotation of any criminality attaching to Mr. Bryant or to any records concerning Mr. Bryant that Mrs. Tripp may speak about. The matter of criminality

1 is going to be for your ultimate determination.

2 BY MR. HOULIHAN:

3 Q Now, Mrs. Tripp, in the Records Division do you keep
4 records of all people who are arrested?

5 A All people who are arrested, yes.

6 Q Are you the custodian of those -- one of the custodians
7 of those records?

8 A Yes, I am.

9 Q I show you Government's Exhibit 51 marked for identifica-
10 tion, can tell us what that is?

11 A Well, this is a xeroxed copy of a record, a bertillon
12 folder, that we assign to a person who has come to our
13 system.

14 Q Do you have the original record with you?

15 A Yes, I do, but because we were afraid that you would
16 attempt to put it into evidence, we made a xeroxed copy.

17 Q That record that is represented by Government's Exhibit
18 51, is that record kept in the ordinary course of business
19 by the Records Division?

20 A Yes, it is.

21 Q Is it the ordinary course of business to keep records
22 at that department?

23 A Yes. The only time they ever leave the floor, even leave
24 the area is when they are subpoenaed.

25 Q When in relationship to an arrest are those records made

1 up?

2 A Well --

3 MR. KREMER: Objection, competency.

4 THE COURT: Overruled. If you know.

5 MR. KREMER: Thank you, your Honor.

6 THE WITNESS: All right. When a person is arrested and
7 brought into the Public Safety Building to the
8 booking office, at that time he is assigned
9 a bertillon number, and that number follows
10 him throughout our system and remains with
11 him for life.

12 BY MR. HOULIHAN:

13 Q Is there a bertillon number in your records for David
14 Bryant?

15 A Yes, there is.

16 Q What is that number?

17 A 58169.

18 Q As part of those records is there any photographs -- are
19 there any photographs as part of that record?

20 A Yes. On the original record, which is what I have here,
21 there is a photograph on the front, and there is a packet
22 of photographs the same as the one on the front enclosed
23 inside.

24 Q Now, referring to the photograph, does that photograph
25 show the bertillon number?

1 A Yes, sir, it does. It shows the subject holding the
2 Rochester Police Department identification placard in
3 front of him with the number and the date that the
4 picture was taken.

5 Q Okay. Now, in your records and on the photograph that
6 is contained in those records is there a bertillon number
7 shown and the date shown?

8 A Yes, sir, there is.

9 Q And what is the bertillon number there?

10 A 58169 and the date is 6/20/75.

11 Q Showing you Government's Exhibit 38, I ask you if that
12 exhibit shows a -- whether that exhibit shows a bertil-
13 lon number?

14 A Yes, it does.

15 Q What is the bertillon number on that photograph?

16 A 58169.

17 Q And what is the date of that photograph?

18 A 6/20/75.

19 Q And is that photograph, as represented by Government's
20 Exhibit 38, the same photograph that is part of your
21 records?

22 MR. KREMER: Objection, competency.

23 THE COURT: If you know.

24 THE WITNESS: Yes, it is, sir.

25 MR. HOULIHAN: No further questions at this time.

1 MR. KREMER: I will need one or two minutes, your Honor,
2 to look over the records.

3 THE COURT: All right.

4 MR. KREMER: I have no questions of this lady.

5 THE COURT: Thank you, Mrs. Tripp.

6

7 (Witness excused.)

8

9 MR. HOULIHAN: The Government calls Lieutenant Cerretto.

10 THE COURT: What are you going to do with him?

11 MR. HOULIHAN: Just to say that the photograph shows him the
12 same way he looked the day of arrest. I never
13 got that out of his testimony.

14 THE COURT: All right.

15 MR. KREMER: Your Honor, for the record -- may Mr. Houlihan
16 and I approach the bench?

17 THE COURT: Yes.

18

19 (Thereupon, the following conference en-
20 sued at the bench:

21 MR. KREMER: At this time I object to the recalling of this
22 witness. My adversary had ample opportunity
23 to not only examine him, but upon my cross-
24 examination Detective Cerretto was redirectly
25 examined, and I believe there was some other

1 examination on top of that. At this time
2 I would object to this procedure.

3 MR. HOULIHAN: If the Court please, for the record, I only
4 want to ask the detective one question which
5 was not permitted because the chain was not
6 established. That is the only question I
7 want to ask him.

8 MR. KREMER: There are other objections, as I recollect,
9 facial hair and --

10 MR. HOULIHAN: I submit, your Honor, that would go to his
11 credibility, not to the admissibility of the
12 testimony.

13 MR. KREMER: If he can't recall something as fundamental
14 as that, in effect we have another in-court
15 show up by one photograph.

16 THE COURT: Well, I frankly don't see the necessity for
17 putting him back on. I agree with Mr. Kremer,
18 he might have been asked a particular question
19 before when you saw that you were not going
20 to need additional testimony before getting
21 38 into evidence. However, at this point,
22 if you move to put 38 into evidence, I will
23 listen to Mr. Kremer, but I am inclined to
24 grant that or allow it into evidence, and I
25 think there is sufficient testimony in al-

1 ready of some indication from Mr. Cerratto
2 concerning his description of the defendant
3 at the time of the arrest, and I don't see
4 a necessity for it in view of Mr. Kremer's
5 complaint about reopening Mr. Cerratto's
6 testimony. I think I will go along with
7 Mr. Kremer.

8 MR. HOULIHAN: All right.

9
10 (Thereupon, the conference at the bench
11 was terminated.)

12
13 MR. HOULIHAN: Your Honor, I move into evidence Government's
14 Exhibit 38.

15 MR. KREMER: Why don't you excuse the detective, and I will
16 come up to the bench?

17
18 (Thereupon, the following conference en-
19 sued at the bench:

20 MR. KREMER: Your Honor, Exhibit 38 is a mug shot made by
21 the Rochester Police Department on June 20,
22 1975. It is a three picture mug shot, which
23 shows a full view, which shows a face view and
24 a side view of my client. In two views my
25 client holds a plaque which says Police De-

partment, Rochester, New York, June 20, 1975.

On the back of the Government's exhibit are the words David Bryant. I would object to its introduction first on the grounds of relevancy and second on the grounds that the prejudicial value of this exhibit far outweighs the probative value. From this mug shot the jury must inextricably draw the conclusion that Bryant is the person who perpetrated this, in fact the police have seized him, and that he is the man, that he is the culprit and --

THE COURT: The what?

MR. KREMER: That he is the culprit, and with respect to the photograph, the jury must absolutely draw the conclusion that my client is guilty just by looking at the photograph and drawing the inference from it that he is the one, and they needn't express it in so many words to each other, the shock value of seeing this mug shot has to prejudice the jury against my client. So again I say that the prejudicial value outweighs its probative value.

MR. HOULIHAN: Your Honor, I submit that the case law in this circuit allows the admissibility of that

1 photograph because it does not disclose any
2 prior criminal record, it only has to do with
3 this particular case. The same problems that
4 Mr. Kremer alludes to are the same problems
5 we have when we have a grand jury indictment
6 precautionary instruction, sufficient to pro-
7 tect any possible prejudice to the defendant.
8 The purpose of the offer is to show what the
9 defendant looked like on the date of his
10 arrest.

11 MR. KREMER: Your Honor, I would have to ask the -- I
12 would ask for a mistrial based upon the sub-
13 stantial prejudice to my client if the Court
14 is going to admit it.

15 THE COURT: Well, I am going to admit it.

16 MR. KREMER: I move for a mistrial, your Honor.

17 THE COURT: Denied.

18 MR. KREMER: Thank you, your Honor.

19 THE COURT: You are going to have the testimony of the
20 individual who was on the stand earlier?

21 MR. HOULIHAN: Yes, right now.

22 THE COURT: We won't show it to the jury until after that.

23 MR. HOULIHAN: Thank you.

24
25 (Thereupon, the conference at the bench

CHARGE OF THE COURT

1
2
3 THE COURT:

At this time, ladies and gentlemen, I am going to tell you the principles of law that will govern your deliberations, and as I am getting organized, if you want to stand up and stretch and sit down again, you may.

4
5
6
7
8 A JUROR:

Is the jury allowed to ask a question?

9 THE COURT:

I will tell you in my instructions exactly how and when you can ask them.

10
11 Now, you have been told, and I reiterate,
12 that it is your duty and your duty alone to
13 determine the facts, and that includes, of
14 course, the ultimate fact of the guilt or
15 innocence of Mr. David Bryant, the defendant.
16 I do not know that I am going to be referring
17 at all to my recollection of the facts, but
18 if I do it will be merely by way of demonstrat-
19 ing some part of my telling you what the rules
20 are, and you are not to consider any such
21 reference that I may make as meaning anything
22 in the case or in any way indicative that I
23 have any view one way or the other as to what
24 your verdict should be.

25 Also during the trial I have ruled on

1 certain motions that have been made by the at-
2 torneys of both sides, and I have ruled on
3 objections that have been made by the attorneys
4 and, again, any of my rulings in that regard
5 are merely purposed to control the case in
6 a proper legal way, they are not to be taken
7 by you as any expression or indication that
8 I have any view one way or the other. You
9 will rely upon your own recollection of the
10 evidence, and do not be influenced by any
11 **BEST COPY AVAILABLE** remark that I make or may make or any of the
12 comments that the attorneys have made concern-
13 ing evidence, although, as I said before,
14 I do urge you to give attention to their re-
15 spective theories.

16 You will have the indictment with you
17 in the jury room while you deliberate; and
18 that will come to you marked as Court Exhibit
19 A, and you can see therein the two counts
20 that we will be dealing with. I emphasize to
21 you that the indictment is meaningless and
22 of no effect, other than to have told David
23 Bryant and to tell the public what crimes
24 he is charged with having committed, to set
25 the stage for this trial, to frame the burden

1 of proof that the Government has in showing
2 that he is guilty of something, and showing
3 that beyond a reasonable doubt. The indict-
4 ment is evidence of nothing, and it is not
5 any evidence of guilt, and you are the first
6 individuals who are concerned with judging
7 his guilt or innocence. You will see in the
8 indictment that two other individuals are
9 mentioned, namely, Elisha Abrams, Jr. and
10 Harold F. Alexander, named as defendants in
11 the indictment, but we and you are merely
12 trying David Bryant and his guilt and innocence,
13 and the actions of the others are to be con-
14 sidered by you only insofar as they bear
15 upon Mr. Bryant's guilt or innocence. His
16 case is being separately disposed of, separate
17 from the others, and you are not to speculate
18 why, and you are to give no attention to it,
19 but you are focusing only upon the guilt or
20 innocence of David Bryant.

21 Now, we are dealing with a two-count
22 indictment, Counts 1 and 2. Count 1, as you
23 will see, says, "That on or about June 20,
24 1975, in the Western District of New York --
25 and I tell you that is an area comprising

1 seventeen counties in this end of the state,
2 and it includes Monroe County and Rochester --
3 Elisna Abrams, Jr., Harold F. Alexander and
4 David Bryant did enter the Lincoln First
5 Bank of Rochester, East End Office, Rochester,
6 New York, the deposits of which were then
7 insured by the Federal Deposit Insurance
8 Corporation, with intent to commit in such
9 bank a felony effecting such bank, that is,
10 the taking by force and violence and by in-
11 timidation from the presence of employees of
12 such bank money belonging to and in the care,
13 custody, control, management and possession
14 of the bank; all in violation of Title 18,
15 United States Code, Section 2113(a)."

16 That section in pertinent part says,
17 "Whoever by force and violence or by intima-
18 tion takes from the person or presence of
19 another any money belonging to or in the care,
20 custody, control, management or possession of
21 any bank is guilty of an offense against the
22 United States." For purposes of this statute
23 and this section, and also the section that
24 underlies Count 2, which I will get to in due
25 course, a bank is one whose deposits are in-

1 sured by the Federal Deposit Insurance Corpor-
2 ation.

3 This crime that is charged in Count 1
4 has three essential elements, each of which
5 must be proved beyond a reasonable doubt be-
6 fore you can find Mr. Bryant guilty thereof.
7 Firstly, the money that was taken belonged
8 to or was in the care of, custody, control,
9 management or possession of a bank whose
10 deposits were insured by the Federal Deposit
11 Insurance Corporation. Second, that the
12 act or acts of taking such money from the
13 person or presence of another by force or by
14 intimidation. Third, the doing of such act
15 or acts willfully.

16 I referred to possession, and the law
17 recognizes two kinds of possession, namely,
18 actual possession and constructive possession,
19 and a person who knowingly has direct physi-
20 cal control over a thing at a given time is
21 said to be in actual possession of it. A
22 person who, although not in actual possession
23 knowingly has both the power and the intention
24 at a given time to exercise dominion or con-
25 trol over a thing, either directly or through

1 another person or persons, is then said to
2 be in constructive possession of it. The
3 law recognizes also that possession may be
4 sole or joint. If one person alone has actual
5 or constructive possession of a thing, the
6 possession is sole. If two or more persons
7 share actual or constructive possession of
8 a thing, possession is joint. If you should
9 find beyond a reasonable doubt -- I am going
10 to be referring to that term from time to time,
11 and in due course I will define it for you --
12 if you should find beyond a reasonable doubt
13 from the evidence in the case that at the time
14 and place of the alleged offense the Lincoln
15 First Bank of Rochester, the East End Office,
16 either alone or jointly with others had actual
17 or constructive possession of the money de-
18 scribed in the indictment, then you may find
19 that such money was in the possession of that
20 bank within the meaning of the word "posses-
21 sion" as used in these instructions.

22 Also I have referred to taking by in-
23 timidation. This means willfully to take
24 or attempt to take by putting in fear of
25 bodily harm, and such feat must arise from

1 the willful conduct of the accused, rather
2 than from some more temperamental timidity of
3 the victim. However, the fear of the victim
4 need not be so great as to result in terror,
5 panic or hysteria. A taking by intimidation
6 must be established by proof of one or more
7 acts or statements of the defendant which
8 were done or made in such a manner and under
9 such circumstances as would produce in the
10 ordinary person fear of bodily harm. However,
11 actual fear need not be proved. Fear like
12 intent may be inferred from statements made
13 and acts done or omitted by the defendant and
14 by the victim, as well, and from all of the
15 surrounding circumstances shown in the evidence
16 in the case.

17 Now, you will note that I said the acts
18 charged must have been done willfully. An
19 act is done willfully if done voluntarily and
20 purposely, and with the specific intent to
21 do that which the law forbids, that is to say,
22 with the purpose either to disobey or to dis-
23 regard the law.

24 Count 2 of the indictment, and again you
25 will have this and you can read it, says,

1 "That on or about June 20, 1975, in the
2 Western District of New York, Elisha Abrams,
3 Jr., Harold F. Alexander and David Bryant
4 by force and violence and by intimidation did
5 take from the person and presence of employees
6 of the Lincoln First Bank of Rochester, East
7 End Office, Rochester, New York, approximately
8 \$28,016. in money belonging to and in the
9 care, custody, control, management and pos-
10 session of the Lincoln First Bank of Rochester,
11 New York, the deposits of which were then
12 insured by the Federal Deposit Insurance
13 Corporation." Very much parallel to Count 1
14 to this juncture, but it goes on: "Elisha
15 Abrams, Jr., Harold F. Alexander and David
16 Bryant in committing the aforesaid offense,
17 did assault Betty Flutts, Betty Rose and
18 Regina Corbett, Lincoln First Bank of Rochester,
19 Rochester, New York, and did put in jeopardy
20 the life of those employees by means and use
21 of a dangerous weapon; all in violation of
22 Title 18, United States Code, Section 2113(d)."
23 This latter section says, "Whoever in commit-
24 ting or in attempting to commit any offense
25 defined in Subsection (a) -- that being the

1 section which underlies Count 1 -- assaults
2 any person or puts in jeopardy the life of
3 any person by the use of a dangerous weapon
4 or device is guilty of an offense against the
5 laws of the United States."

6 Herein again we have essential elements
7 the the Government must prove beyond a rea-
8 sonable doubt and to your satisfaction.
9 First, the act or acts of taking from the
10 person or presence of another money belonging
11 to or in the care, custody, control, manage-
12 ment or possession of a bank, as I have de-
13 fined that. Second, the act or acts of tak-
14 ing such money by force or violence or by
15 means of intimidation. Third, the act or
16 acts of assaulting or putting in jeopardy
17 the life of any person by the use of a danger-
18 ous weapon or device while engaged in steal-
19 ing such money from a bank and, fourth, doing
20 such act or acts willfully.

21 As I have stated, the burden is always
22 upon the prosecution to prove beyond a rea-
23 sonable doubt every essential element of the
24 crime charged, and the law never imposes upon
25 the defendant in a criminal case, such as

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WESTERN DISTRICT OF NEW YORK

1 this, the burden or duty of calling any wit-
2 nesses or producing any evidence.

3 If you should find beyond a reasonable
4 doubt from the evidence in the case that the
5 accused, Mr. Bryant, did willfully commit
6 robbery of the bank as charged, then you must
7 proceed to determine whether the evidence in
8 the case establishes that he in committing
9 robbery of the bank assaulted or put in
10 jeopardy the lives of Betty Flutts or Betty
11 Rose or Regina Corbett, as charged in the
12 indictment. Any willful attempt or threat
13 to infli injury on the person of another,
14 when coupled with an apparent present ability
15 to do so or any intentional display of force,
16 such as would give a victim reason to fear
17 or to expect immediate bodily harm, constitutes
18 an assault. An assault may be committed
19 without actually touching or striking or
20 doing bodily harm to the person of another.
21 So a person who has the apparent ability to
22 inflict bodily harm or injury upon another
23 person, and who willfully attempts or even
24 threatens to inflict such bodily harm, as
25 by intentionally flourishing or pointing a

1 pistol or a gun at another person, may be
2 found to have assaulted the other person.
3 Now, let me deal first with the putting in
4 jeopardy. The test of whether a victim's
5 life has been placed in jeopardy is an ob-
6 jective one, and it is not whether the person
7 was put in fear, but whether her life was
8 put in danger by the use of a dangerous
9 weapon, and in this connection you can con-
10 sider the testimony indicating that a gun was
11 displayed during the robbery we have heard
12 about, and although there is no direct or
13 eyewitness testimony that the guns brought
14 into the bank were loaded, evidence that a
15 robber displayed a gun to back up his demands
16 may indicate to you that he wanted the victim
17 to believe it was loaded, and you may infer
18 that the gun was loaded from that evidence
19 under the rules which I will give you later
20 concerning direct and circumstantial evidence
21 and inferences. A dangerous weapon or de-
22 vice includes anything which is capable of
23 being readily operated, manipulated, wielded
24 or otherwise used by one or more persons to
25 inflict severe bodily harm or injury on

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1 another person. So an operable firearm, such
2 as a pistol, revolver or other gun, capable
3 of firing a bullet or other ammunition may
4 be found to be a dangerous weapon or device.
5 To put in jeopardy the life of a person by
6 the use of a dangerous weapon or device means
7 then to expose such person to a risk of death
8 or to the fear of death by the use of such
9 dangerous weapon or device.

10 Now, an act is done knowingly if it is
11 done voluntarily and intentionally, and not
12 because of mistake or accident or other in-
13 nocent reason, and the purpose of requiring
14 that it be done knowingly is to insure that
15 no one would be convicted for an act done be-
16 cause of mistake or accident or other innocent
17 reason. As I have stated before, specific
18 intent must be proved beyond a reasonable
19 doubt before you may convict.

20 Now, I have told you about Counts 1 and
21 2 as they literally would stand before you.
22 I also charge you that a person may be found
23 guilty by you of either of those offenses if
24 you find that in lieu of the person actually
25 doing or being guilty of every one of the

1 elements that must be present in either of
2 those counts, if you find that the person
3 aided or abetted, Section 2 of Title 18 of
4 the United States Code provides, "That who-
5 ever commits an offense against the United
6 States -- which would be the type that I have
7 already dealt with in Counts 1 and 2 -- or
8 aids, abets, counsels, commands, induces
9 or procures its commission is punishable as
10 a principle." In other words, every person
11 who willfully participates in or assists in
12 the commission of a crime, may be found to
13 be guilty of that offense. Participation is
14 willful if done voluntarily and intentionally,
15 with the specific intent to do something
16 which the law forbids, as I said before,
17 namely, with a bad purpose either to disobey
18 or disregard the law. Now, in order to aid
19 and abet another to commit a crime, it is
20 necessary that the accused, Mr. Bryant in
21 this case, willfully associate himself in
22 some way with the criminal venture, and will-
23 fully participate in it, as he would in some-
24 thing he wishes to bring about, that is to
25 say, he willfully seeks by some act or omis-

1 sion of his to make the criminal venture
2 succeed. You, of course, may not find him
3 guilty unless you find beyond a reasonable
4 doubt that every element of the offense, as
5 defined in these instructions, was committed
6 by some person or persons, and that the
7 defendant, Mr. Bryant, willfully and inten-
8 tionally, participated in its commission.
9 The mere presence at the scene of a crime,
10 and knowledge that a crime is being committed,
11 are not sufficient to establish that the de-
12 fendant aided and abetted the crime, unless
13 you find beyond a reasonable doubt that the
14 defendant was a participant and not merely
15 a knowing spectator. To convict the defendant
16 of aiding and abetting in the commission of
17 the criminal offense charged in Count 1 and
18 Count 2, you must find beyond a reasonable
19 doubt that at the time of the actual robbery
20 the defendant, David Bryant, specifically
21 intended to participate in the robbery or
22 that at the minimum that the defendant knew
23 that there was to be a robbery.

24 Now, there are certain rules of law,
25 some of which I have already mentioned or

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1 alluded to, which are common in all criminal
2 cases, and which you must apply in reviewing
3 the evidence which is before you. A basic
4 rule in all criminal cases is that the de-
5 fendant, David Bryant, is presumed to be in-
6 nocent. That presumption of innocence re-
7 mains with him throughout the trial, and it
8 continues to exist until such time as each
9 of you is convinced beyond a reasonable doubt
10 by legal and competent evidence that he is
11 guilty of the offense or offenses charged,
12 and the burden of proof that he is guilty
13 beyond a reasonable doubt rests with the
14 Government at all times, it never shifts to
15 the defendant. In order to sustain its burden,
16 the Government must present proof which is
17 sufficiently drawn to convince each of you
18 of the defendant's guilt beyond a reasonable
19 doubt, and the requirement that the prosecution
20 prove the defendant's guilt beyond a reason-
21 able doubt extends to every essential element
22 of the crime or crimes charged against him.

23 If you are satisfied from a review of
24 all of the evidence in the case that the
25 evidence as to a particular count establishes

1 defendant's guilt beyond a reasonable doubt,
2 then you may convict him on that count. On
3 the other hand, if you have a reasonable
4 doubt at any point with respect to the guilt
5 of Mr. Bryant as to a particular count under
6 consideration, you must acquit him on that
7 count. You will, of course, separately weigh
8 and determine the evidence as to each count
9 in the indictment. You will determine his
10 guilt or innocence as to each count separately.
11 ly.

12 I have mentioned reasonable doubt, and
13 this is a doubt which is based upon reason
14 and common sense, and which arises from the
15 state of the evidence. Now, of course, it
16 is rarely possible to prove anything to an
17 absolute certainty, and proof beyond a reason-
18 able doubt therefore is established if the
19 evidence is such as you would be willing to
20 rely and act upon in the most important of
21 your own affairs. Defendant is not to be
22 convicted on mere suspicion or conjecture.
23 A reasonable doubt may arise not only from
24 the evidence produced but also from a lack
25 of evidence. Because the burden is upon the

1 prosecution to prove beyond a reasonable doubt
2 that Mr. Bryant is guilty of every essential
3 element of the crimes charged, defendant has
4 the right to rely upon any failure of the
5 prosecution to establish such proof, and de-
6 fendant may also rely upon evidence which his
7 attorney has brought out on cross-examination
8 of the Government witnesses. As I said be-
9 fore, the law does not impose upon the de-
10 fendant the duty of producing any evidence.
11 Now, a reasonable doubt is such a doubt as is
12 based upon reason, and as appeals to your
13 power of logic. It is a doubt which arises
14 out of something tangible in the evidence in
15 the case or something lacking in the case.
16 It is a doubt for which you have a reason,
17 whether or not you have an ability to put it
18 into words. It is to be distinguished from
19 a doubt which might be based upon some emo-
20 tion, such as a whim, a feeling or fancy.
21 As I have said, it is a doubt for which you
22 have a reason. If you feel uncertain and
23 are not fully convinced that the defendant
24 is guilty of the crime charged in a particular
25 count, and you believe you were acting in a

1 reasonable manner, and you believe a reason-
2 able man or women in any manner of like im-
3 portance would hesitate to convict because
4 of such a doubt as you have, that is a rea-
5 sonable doubt, and the defendant is entitled
6 to the benefit of it. If you have such a
7 doubt, you must acquit the defendant. A
8 reasonable doubt in your mind as to any es-
9 sential element of the crime entitles the
10 defendant to acquittal of that particular
11 crime. However, the rule that the Government
12 must prove every essential element beyond a
13 reasonable doubt does not mean that you must
14 believe the testimony of every Government
15 witness as being true beyond a reasonable
16 doubt or that every piece of evidence offered
17 is true beyond a reasonable doubt. It only
18 means that the credible evidence as weighed
19 and found by you under these instructions,
20 and as viewed as a whole, must establish every
21 essential element of the crime and the de-
22 fendant's guilt beyond a reasonable doubt.

23 As the sole judges of the facts, you
24 must determine which of the witnesses you
25 believe, what portion of their testimony you

1 accept and what weight you attach to it. At
2 times during the trial I sustained objections
3 to questions which were asked without per-
4 mitting the witness to answer or where an
5 answer was given and, in a couple of instances,
6 a whole segment of testimony, I may have in-
7 structed that it be stricken from the record
8 and told you to disregard it and dismiss it
9 from your mind. You may not draw any in-
10 ference from an unanswered question nor may
11 you consider testimony which has been stricken
12 in reaching your decision. The law requires
13 that your decision be made solely upon the
14 competent evidence before you, and such items
15 as I have excluded from your consideration
16 are not legally admissible and must not be
17 considered.

18 Now, also you are the sole judges of the
19 weight that you are going to assign to the
20 testimony of the different witnesses. Some
21 of the evidence in the case may be more be-
22 lievable than other evidence. The matter of
23 the credibility of the witnesses, and this
24 includes witnesses who may be policemen or
25 agents of the FBI that you have heard, is one

1 of the questions of fact which you must take
2 into consideration in arriving at your verdict,
3 and you are entitled to and you should utilize
4 your observations of the witnesses as they
5 appear before you and your own experience
6 in your respective lives in deciding when and
7 whether someone is telling the truth. You
8 may find that one witness is a better observer,
9 had a more accurate memory or was otherwise
10 more reliable than other witnesses. You may
11 take into consideration in evaluating the
12 testimony, the demeanor of the witnesses on
13 the stand and the interest or lack of interest
14 which he or she has in the outcome of this
15 litigation. If you find that a witness has
16 knowingly testified falsely concerning any
17 material matter, you have a right to discount
18 his or her entire testimony or you may take
19 from that testimony what you believe to be
20 true and disregard what you believe not to
21 be true. In that connection, a witness know-
22 ingly testifies falsely if he or she thus
23 testifies intentionally or not merely be-
24 cause of mistake or other innocent reason.

25 Ordinarily witnesses are not permitted

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1 to give opinions or conclusions. There is
2 an exception to this rule which exists in the
3 area of what we call expert witnesses, and
4 Mr. Harry D. Fraysier was such a witness
5 in this case. These are witnesses who by
6 education and experience have become expert
7 in some art, science, profession or calling,
8 and they are permitted to state their opinions
9 as to relevant and material matters in which
10 they profess to be expert. They may also
11 state their reason for their opinion. You
12 are to consider each expert opinion, and Mr.
13 Fraysier gave two or three separable opinions
14 perhaps, and you may consider each expert
15 opinion which I received in evidence, and
16 you are to give to it such weight as you think
17 it deserves. If you decide that the opinion
18 of an expert witness is not based upon suf-
19 ficient education and experience or if you
20 conclude that the reasons given in support
21 of the opinion or not sound, or if you feel
22 it is outweighed by other evidence, you can
23 disregard the opinion completely.

24 Now, the identification of Mr. Bryant
25 as the person who stood at a tellers cage or

1 in the area of the tellers cages on June 20,
2 1975 is, of course, one of the key elements
3 of the Government's burden of proof in this
4 case. In considering identification testi-
5 mony, you are to keep in mind such testimony
6 should be considered with great caution. No
7 class of testimony is more uncertain or less
8 to be relied upon than that as to identity.
9 Identification testimony is an expression of
10 belief or impression by the witness. Its
11 value depends upon the opportunity the wit-
12 ness had to observe the defendant at the
13 time of the offense and to make a reliable
14 identification later. In appraising the
15 identification testimony of a witness, you
16 should consider the following. Are you con-
17 vinced that the witness has the capacity and
18 an adequate opportunity to observe the of-
19 fender? Whether the witness had an adequate
20 opportunity to observe the offender at the
21 time of the offense will be affected by such
22 matters as how long or short a time was avail-
23 able; how far or how close the witness was;
24 how good were the lighting conditions, and
25 whether the witness had had occasion to see

1 or know the person in the past. Secondly,
2 you must consider the credibility of each
3 identification witness in the same way as any
4 other witness. Consider whether he or she
5 is truthful; whether he or she had the cap-
6 acity and opportunity to make a reliable
7 observation on the matters covered in the
8 testimony. I again emphasize that the burden
9 of proof is on the prosecutor, and extends
10 to every element of the crime charged, and
11 this specifically includes the burden of prov-
12 ing beyond a reasonable doubt the identity
13 of the defendant as the perpetrator of the
14 crime of which he stands charged. If after
15 examining the testimony you have a reasonable
16 doubt as to the accuracy of the identification,
17 then you must find the defendant not guilty.
18 There are two types of evidence from which
19 you may properly find a defendant guilty of
20 an offense. Such proof may consist of the
21 testimony of those who witnessed certain con-
22 duct and who have testified to that conduct
23 in the course of the trial. This is often
24 called direct evidence or eyewitness evidence.
25 Proof of a chain of circumstances pointing

1 to the commission of an offense by the de-
2 fendant is termed circumstantial evidence.
3 You may, of course, consider and find that
4 both types of evidence, direct and circum-
5 stantial, bear on the question of the innocence
6 or guilt of Mr. Bryant. As a general rule,
7 the law makes no distinction between direct
8 and circumstantial evidence, but simply re-
9 quires that before convicting Mr. Bryant,
10 you must be satisfied of his guilt beyond a
11 reasonable doubt.

12 Now, you may consider proper inferences.
13 Basically an inference is nothing more than
14 a deduction or a conclusion which reason and
15 common sense lead you to draw from facts
16 which have been proven. As I have stated
17 before, any inference which you draw from the
18 evidence must reasonably flow from and be based
19 upon the evidence, and it must be based upon
20 the facts established in the case by the evi-
21 dence. Now, because a permissible inference
22 in law must flow naturally and logically from
23 the evidence and be based upon the evidence,
24 as proved to your satisfaction, it follows
25 that you may not base further inferences

1 merely upon an inference already drawn. One
2 inference may not be based upon or drawn from
3 another inference. If in the course of your
4 consideration of all of the evidence as to
5 Mr. Bryant, you find that certain evidence
6 admits equally of two inferences, one sup-
7 porting innocence, the other supporting
8 guilt, you must accept the inference support-
9 ing innocence and you must reject the in-
10 ference supporting guilt.

11 I have told you already that a defendant,
12 such as Mr. Bryant, in our courts in America
13 is under no obligation to give any evidence
14 whatsoever. You are not to draw any inference
15 from his failure to take the stand. He has
16 a right to go to the jury on the contention
17 that the evidence of the Government, of the
18 prosecution, is insufficient to warrant his
19 conviction under the rules of law which I have
20 been outlining to you.

21 Again, I remind you that yours is the
22 sole responsibility to find the facts, to
23 determine the facts. I have not really given
24 or intended not to give any examples or factual
25 indications, but again if I have, you are not to

1 take any such as any indication of how I
2 think you should find. All of the matters
3 and the ultimate matter of the guilt or in-
4 nocence of Mr. Bryant is solely your decision,
5 and I have no part in making that decision,
6 other than to have told you what the law is
7 which will control your deliberations.

8 Your verdicts, and there will be two
9 verdicts, there will be a verdict as to each
10 of the counts, a verdict as to Count 1, and
11 a verdict as to Count 2, must be reached
12 unanimously, with all twelve of your agreeing
13 on the particular result. I have told you
14 that I am sending a copy of the indictment
15 to the jury room, and it will be marked Court
16 Exhibit A. Now, keep in mind that the in-
17 dictment is not evidence, it is merely the
18 device which we use to advise Mr. Bryant of
19 the charges which have been lodged against
20 him. You are not to consider it as proving
21 or tending to prove anything whatsoever.

22 Now, each of you took an oath when you
23 were sworn in as members of the jury. You
24 said that you would well and truly try the
25 issues joined in this case and a true verdict

1 give herein, according to the evidence, so
2 help you God. I suggest to you that if you
3 follow that oath and try the issues, without
4 combining your thinking with any emotion,
5 that you will arrive at a true and just
6 verdict. It must be clear to you that once
7 you get into an emotional state, and you let
8 bias or sympathy or prejudice interfere with
9 your thinking, then you will not arrive at
10 such a verdict.

11 As you deliberate, be careful to listen
12 to the opinions of the other jurors, and ask
13 for an opportunity to express your own views.
14 No one juror holds center stage in the jury
15 room, and no one juror controls or monopolizes
16 the deliberations. If after listening to the
17 other jurors, and if after stating your own
18 view, you become convinced that your view is
19 wrong, do not hesitate because of stubbornness
20 or pride of opinion to change your view. On
21 the other hand, do not surrender your honest
22 conviction solely because you are outnumbered.

23 As I said, your verdict must be unani-
24 mous. It must represent the absolute con-
25 viction of each one of you. As you retire,

1 as a first order of business, select one of
2 your number to speak for you when you return
3 to court or when you have to communicate with
4 me. I told Juror No. 8 that I would tell her
5 and you how to communicate with me. I have
6 already told you in one regard that you ask
7 questions of each other and talk back and
8 forth among yourselves. Next, if you find
9 any need to ask any questions or whether you
10 want part of the testimony read or part of
11 my instructions read or restated to you or
12 have some other question, write out a note
13 and hand it to the deputy marshal who will be
14 on duty outside of your jury room, and you
15 can ask me any question, and I will get the
16 note and I will resolve the particular prob-
17 lem, usually bringing you into the courtroom,
18 almost uniformly doing so. Tell me by a note
19 when you have reached your verdict, or if
20 this becomes appropriate, of course, you can
21 tell me when you find yourselves so deadlocked
22 that you feel unanimity is impossible. Never
23 would you come into the courtroom and tell me
24 or anyone else how your voting stands at any
25 time, except to state in open court that a

1 verdict or verdicts have been reached un-
2 animously.

3 Now, Mr. Kremer and Mr. Houlihan, are
4 there any exceptions or requests and, if so,
5 do you want to be heard on either in absence
6 of the jury?

7 MR. HOULIHAN: No questions nor exceptions.

8 MR. KREMER: One request, your Honor.

9 THE COURT: Okay. Do you want to be heard in the presence
10 of the jury?

11 MR. KREMER: I can come up to the bench.

12
13 (Thereupon, the following conference en-
14 sued at the bench:

15 MR. KREMER: I request that you charge Title 18, United
16 States Code, Section 2113(b) and (c).

17 THE COURT: No. (c) merely is a possession of funds,
18 there is nothing in the evidence. Letter (c)
19 has three paragraphs to it?

20 MR. KREMER: I will bring it right up.

21 THE COURT: No evidence at all on (c).

22 MR. KREMER: And (b)?

23 THE COURT: (b), no, not under the evidence in this case.
24 To use the vernacular, it either is or it
25 ain't. I won't do it.

1 MR. KREMER: Exception, your Honor. Thank you, your Honor.

2
3 (Thereupon, the conference at the bench
4 was terminated.)

5
6 THE COURT: As I said, the first order of business is
7 to elect someone of your group to be your
8 spokesperson when you want to be in touch
9 with me. Perhaps as a second order of busi-
10 ness, in view of the hour, and all of us
11 apologize to you for that. decide whether
12 you want to go into some extensive delibera-
13 tion or whether you would want to go out and
14 be our guests at dinner. If you do, let me
15 know and we will make the arrangements and
16 send you out. Swear the deputies.

17
18 (Thereupon, two deputy marshals were duly
19 sworn.)

20
21 THE COURT: Of course, the individuals who will decide
22 the case of the twelve main jurors. You,
23 Mr. Fay, will not participate in it. I have
24 to ask you to not go into the jury room. Do
25 you have personal clothing in there?

1 ALTERNATE JUROR: Yes, sir.

2 THE COURT: All right, we will arrange to get that out
3 for you. The twelve jurors will retire at
4 this time with the deputies. The exhibits
5 will be sent in to you and the indictment,
6 and, Mr. Fay, as I say, we will arrange to
7 get your clothing out. Then let me know if
8 you want to have dinner.

9
10 (Thereupon, the jury exited the courtroom
11 at 6:15 P.M.)

12
13 THE COURT: Mr. Fay, yours is that tough duty where you
14 had to endure everything that has gone on,
15 all the fulminations and tedious detail, and
16 I have noticed that you have been paying close
17 attention. You have been our insurance poli-
18 cy in case something happened to one of the
19 jurors. Luckily, aside from what originally
20 happened with Mrs. Burks, which put Mr. Rotelli
21 into an active jury situation, and moved you
22 up to alternate No. 1, nothing else has oc-
23 curred. Consequently, you are dismissed at
24 this time. We will see that you get your
25 personal items out. Whether or not you talk

1 with any party or any attorney about your
2 views of the case is completely up to you.
3 I make no restriction upon it, except this,
4 that I ask that you do not talk with anybody
5 about it until after the jury has returned
6 its verdict, and then you may talk to whoever
7 you want. We will let you know when we next
8 want to have you back in.
9

10 (Thereupon, the court was in recess at
11 6:16 P.M.)
12

13 (Proceedings resumed, pursuant to recess,
14 commencing at 9:05 P.M.)
15

16 (Defendant present, counsel present, jury
17 present.)
18

19 THE COURT: All right, who is the person who is speaking
20 for the jury?

21 JUROR NO. 9: I guess I am.

22 THE COURT: You are Mrs. Chiaba?

23 FORELADY: Yes.

24 THE COURT: I have a group of notes, two of which I under-
25 stand were handed by you to the deputy marshal

1 as you went out for dinner, and which I re-
2 ceived just a few minutes ago as I came back,
3 and I have three others that I've just now
4 received. Firstly, the earlier one says on
5 the back, "We want to quit." I think that
6 was superceded by your separate note, "We
7 want a quick dinner." On the front it says,
8 "We want a magnifying glass, if possible."
9 We have a magnifying glass that you may have,
10 we will hand that to you. The second pre-
11 dinner note was two questions; one, "Did
12 they ever recover the money?", and two, "One
13 witness said she thought he had a wig. Was
14 a wig ever found?" Now, after dinner the one
15 question, "How much weight has David Bryant
16 lost since he has been under arrest?" The
17 second note, "Did anyone ever find a black
18 wig in the possession of the defendant?", and
19 the second question, "Why was no mention ever
20 made of any money found in the defendant's
21 possession?" Then finally, the third of the
22 recent notes, "We would like to have more
23 clarification concerning location of the
24 cage numbers, where he entered and left while
25 jumping over the counters, What cage did he

1 enter, leave? Was testimony about the wig
2 stricken?" Now, dealing with that last
3 question, the testimony about the wig was
4 not stricken. Now, concerning the other
5 three aspects, four aspects actually, namely,
6 the cage numbers involved in the entry and
7 jumping over, and so forth, and the possibil-
8 ity of there being found a black wig, and the
9 possibility of any money having been found
10 in the defendant's possession or what hap-
11 pened to it, or how much weight has David
12 Bryant lost since he has been under arrest,
13 all of these fall into a category of aspects
14 of the case as to which there was not any
15 evidence in the case. There was nothing
16 one way or the other on finding a wig, one
17 way or the other on finding money, or one
18 way or the other on whether or not Mr. Bryant
19 has lost weight and, if so, how much. All
20 of those are called voids in the testimony.
21 As to those, you cannot speculate in reach-
22 ing your decision as to whether the answers
23 would be such and such if they were in the
24 evidence. You cannot speculate that a wig,
25 for example, was found. You cannot speculate

1 that a wig was not found. If you would
2 consider, for example, the question of find-
3 ing a wig as being a material element to
4 glue together various pieces of a picture
5 which is necessary for your determination,
6 you could consider the lack of evidence,
7 the omission to put in that evidence, and
8 charge it against the party having the burden
9 or proof. Now, obviously in this case the
10 Government has the total burden of proof as
11 to all elements. So if you were to consider,
12 for example, that it would be necessary for
13 you to know about the wig in order to come
14 to a conclusion -- let me hypothesize --
15 come to a conclusion of guilt, you would say
16 that the omission of that might create a
17 reasonable doubt in your minds, you can charge
18 that omission to the Government. So really
19 it is an absence of evidence, and if the
20 absence itself is material, than charge the
21 Government with it. You cannot speculate as
22 to what the evidence would be if you heard
23 it. The same thing is true on the recovery
24 of the money, and the same thing is true on
25 David Bryant's weight. Now, on the other

1 matter, as to location, cage numbers where
2 Mr. Bryant or the individual who was spoken
3 of entered and left while jumping over the
4 counters, what cage did he enter, what cage
5 did he leave. There was testimony about that
6 in the case, there is evidence about that
7 in the case, and if you want some particular
8 testimony read to you that bears upon that,
9 I would say that he could not just -- of
10 course, we could read the whole thing to
11 you but it would be -- I think we would
12 probably have to have you see if you could
13 come up with the names of witnesses who
14 dealt with that. For example, we know that
15 Mrs. Vickers' testimony dealt with that in
16 some regard. One of the other tellers, the
17 one who was in cage number 3, what was her
18 name, Mr. Houlihan?

19 MR. HOULIHAN: Regina Corbett.

20 THE COURT: She dealt with it, indicating this person
21 coming over into a certain cage. One witness
22 that I remember talked of their leaving,
23 their backing out or leaving, and I can't
24 think who that was.

25 MR. HOULIHAN: That was again Mrs. Corbett.

1 THE COURT:

2 Now, it is possible that we could locate
3 those segments of those witness' testimony
4 and read those to you, being what we would
5 think would be all of the evidence that would
6 bear upon this particular matter. You might
7 have a recollection of some other witness who
8 said something about it and, if so, we would
9 dig that out, and Mr. Krerner and Mr. Houlihan
10 and I might remember some other witness who
11 said something about it. That is all I can
12 do for you on the latter question. The evid-
13 ence is in, we cannot supplement it, we can
14 only go back over what is in the record, if
15 you want that done.

16 FORELADY:

17 We are in agreement that we would like to
18 hear that portion again.

19 THE COURT:

20 All right. Mrs. Corbett certainly talked
21 about it, Mrs. Vickers talked about it. Was
22 there to either of your recollections any
23 other witnesses who talked about it?

24 MR. HOULIHAN:

25 Edward Flutts has some testimony.

MR. KREMER:

Betty Rose gave some testimony.

THE COURT:

All right. Let's see, Betty Rose was the
second witness, and very early in her testi-
mony she gave some indication of the cage

1 number, also what the man did a little bit
2 after that. Regina Broderick --

3 MR. HOULIHAN: Corbett.

4 THE COURT: -- Corbett, also very early in her testimony,
5 she was the next witness, talked about it,
6 and she also talked of another man climbing
7 over the counter, and got into some of the
8 photographs, indicating that one of them was
9 one who came over the counter. Mr. Flutts
10 talked about it. Those are three witnesses
11 in a row, and I guess Mrs. Vickers, I think
12 those four. Mr. Noel, do you have all your
13 notes here?

14 REPORTER: Yes, your Honor.

15 THE COURT: All right.

16
17 (Thereupon, reporter read the direct ex-
18 amination of Betty Ann Rose; the direct ex-
19 amination of M. Regina Broderick, and the
20 direct examination of Edward M. Flutts.)

21
22 THE COURT: The only other one I see is the very last
23 witness who came on this afternoon, Mrs.
24 Vickers.

25 MR. KREMER: May we approach the bench, your Honor?

(Thereupon, off the record discussion ensued at the bench.)

THE COURT:

The first witness, Dale Pensgen, immediately after they had offered and received the FDIC certificate, which is Government's Exhibit 12, they got into Government's Exhibit 13, and I think it is that segment that might have part of it in up to the point of it being offered, and then it was not received.

(Thereupon, reporter read that portion of the direct testimony of Dale A. Pensgen commencing at Page 19, Line 21 and ending at Page 25, Line 24.)

THE COURT:

That is all I have on the testimony of Mr. Pensgen. The only other part I have is the testimony of Mrs. Vickers on direct examination.

(Thereupon, reporter read that portion of the direct examination starting at Page 327, Line 17 to Page 329, Line 17.)

1 THE COURT: I have nothing further in her testimony that
2 would bear upon what counter anyone jumped
3 over or was on top of or anything else.

4 MR. HOULIHAN: It is my recollection that there is some
5 minor reference to it, your Honor, in the
6 latter part of the testimony, but I don't
7 know whether it is significant or not, if the
8 jury would like to hear that.

9 MR. KREMER: That is my recollection, too.

10 THE COURT: The very last thing, the very last item,
11 possibly where she was talking about Govern-
12 ment's Exhibit 5, which was the very last
13 bit of her testimony, you might just glance
14 at that and see if that shows anything, Mr.
15 Noel.

16
17 (Thereupon, reporter checked the record
18 with a negative result.)
19

20 THE COURT: I think we have it all. That, ladies and
21 gentlemen, to the best of our recollection
22 and ability gives you all the testimony that
23 bears upon that facet of the case. So unless
24 you right now have a further question, I will
25 ask you to retire and go into further delib-

1 erations. If you have a further question,
2 let me know.

3
4 (Thereupon, the court was in recess at
5 10:00 P.M.)

6
7 (Proceedings resumed, pursuant to recess,
8 commencing at 11:00 P.M.)

9
10 (Defendant present, counsel present, jury
11 absent.)

12
13 THE COURT:

14 The question I now have is this, "Pertaining
15 to Donna Vickers' testimony concerning the
16 man approaching her crouched down, did she
17 say that the man that approached her had
18 dark clothing, and if that man was the de-
19 fendant?" We had read to the point that Mr.
20 Noel just indicated, where she said that the
21 man jumped down, he was about as far away
22 as the end of the table, and we stopped there.
23 Some of the subsequent testimony may not di-
24 rectly bear upon this question, but it is
25 hard to tell just what it is, and I would
propose that we read the balance of the

1 direct, and read the cross-examination and
2 redirect examination, which would comprise
3 the balance of her testimony. It is not that
4 lengthy.

5 MR. KREMER: Thank you, your Honor.

6 MR. HOULTHAN: Yes, sir.

7
8 (Thereupon, the jury entered the courtroom
9 at 11:05 P.M.)

10
11 THE COURT: Now, Mrs. Chiaba, I have advised the attorneys
12 as to the content of this recent note, and
13 I will just read that so that all of you can
14 have it mind. "Pertaining to Donna Vickers'
15 testimony concerning the man approaching her
16 crouched down, did she say that the man that
17 approached her had on dark clothing, and if
18 that man was the defendant?" You remember that
19 when you were last in we read a portion of
20 Mrs. Vickers' testimony, and we came to the
21 point that she indicated the man jumping
22 over the counter, and indicated that at that
23 point the man was about as far away from her
24 as the end of the table. I stopped the read-
25 ing right there. Her testimony is not that

lengthy, and it goes in and out of this other question, and I am proposing that we read the balance of her testimony to you, is that satisfactory?

FORELADY:

Yes, sir.

(Thereupon, the reporter read that portion of the testimony of Donna M. Vickers commencing at Page 329, line 18 to Page 354, line 8.)

MR. HOULIHAN:

Your Honor, I think the first part of that testimony does speak to the clothing, the very first part of the testimony.

THE COURT:

If so, the jury had it read to them. I hope you have in mind my suggestion, and you are talking to each other and listening, and trying to come to some consensus. Obviously, there is no pressure upon you, but we hope you are exchanging views and listening.

(Thereupon, the court was in recess at 11:30 P.M.)

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(Proceedings resumed, pursuant to recess,

1 commencing at 11:45 P.M.)

2
3 (Defendant present, counsel present, jury
4 absent.)

5
6 THE COURT: One thing I have to admit is that Mr. Noel
7 reads very persuasively. I have word they
8 have reached a verdict. Bring them in.

9
10 (Thereupon, the jury entered the courtroom
11 at 11:47 P.M.)

12
13 THE COURT: Mrs. Chiaba, I have a note from you indicat-
14 ing that the jury has reached a verdict, is
15 that correct?

16 FORELADY: Yes, sir.

17 THE COURT: Now, as to Count 1, how has the jury found
18 as to the guilt or innocence of David Bryant?

19 FORELADY: We find the defendant guilty as charged.

20 THE COURT: And as to Count 2, how does the jury find as
21 to the guilt or innocence of David Bryant?

22 FORELADY: Also guilty.

23 THE COURT: Do you want them polled?

24 MR. KREMER: Yes, your Honor.

25 THE COURT: Poll the jury.

1 THE CLERK:

2 If your verdict is as it has been reported
3 to the Court, please answer by saying yes.
4 If your verdict is not as the Court has re-
5 corded it, please answer by saying no.

6 (Thereupon, the jury was polled, each
7 juror responding in the affirmative.)
8

9 THE COURT:

10 Ladies and gentlemen, thank you very much.
11 I apologize for keeping you up this late.
12 I ordinarily, I admit, would have allowed
13 you to go home at an earlier hour and come
14 back and resume tomorrow. The trouble is
15 that I personally am tied up in Buffalo to-
16 morrow and Friday, and while I could have
17 come in on Saturday, I don't think any of
18 you would have wanted to do that. I apologize
19 for the lateness. Thank you very much for
20 the close attention you have paid to all of
21 the evidence and obviously your intense de-
22 liberations and considerations. Now, you
23 are free to go, and we will let you know
24 when next we need to have you back. As far
25 as talking with any of the attorneys or any
of the people involved, I leave that completely

1 up to you. You may talk with anybody, if you
2 want, you need not talk with anybody, and if
3 you do talk, I only ask that you don't get
4 into the details of the deliberations that
5 you had in the jury room. You may go, thank
6 you very much.

7
8 (Thereupon, the jury exited the courtroom
9 at 11:50 P.M.)

10
11 THE COURT:

12 We don't have a representative from the
13 Probation Office here. I would assume they
14 can get into the situation tomorrow. Mr.
15 Bryant will be here, and they can talk with
16 him. It would seem to me, in view of the
17 other circumstances that Mr. Bryant finds
18 himself in, that it won't take as much time
19 as usual to prepare a presentence report. I
20 would think that a great package of that
21 exists in the other matter, which can be
22 supplemented to whatever degree it needs here.
23 I am going to be over here on the afternoon
24 of Monday, November 22, and I would suggest
25 that we shoot for that time as a time of
sentencing.

1 MR. KREMER: I would like to see that report.
2 THE COURT: Oh, yes, I will make sure that you see the
3 report.
4 MR. KREMER: I will want to furnish you with some brief.
5 THE COURT: You can send me any letters or communications
6 of that nature that you want to. Send it
7 to me in Buffalo. If there is any material
8 you want to have incorporated in the pre-
9 sentence report, give it to the probation
10 officer here. If you want to make any motions
11 directed against the verdict, I would suggest
12 that we let that go again until that same
13 time. I will allow you to make any motion
14 at that time without prejudice to your situa-
15 tion.
16 MR. KREMER: Thank you, your Honor.
17 THE COURT: All right.

18
19 (Thereupon, the court was in recess at
20 11:52 P.M.)

21
22 ooOoo
23
24
25

IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

-VS-

AFFIDAVIT OF SERVICE

DAVID BRYANT,


CR 76-1567

Defendant-Appellant.

STATE OF NEW YORK)
COUNTY OF MONROE)

SS:

On February 22, 1977, the undersigned
served GERALD J. HOULIHAN, Assistant United States
Attorney for the Western District of New York with a
copy of a brief and appendix in the above appeal.


Alfred P. Kremer

Sworn to before me this

22nd day of February, 1977.



DONNA C. BROWN
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within
has been compared by the undersigned with the original and
found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

ss:

INDIVIDUAL VERIFICATION

deponent is the
read the foregoing
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and
belief, and that as to those matters deponent believes it to be true.
Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
the corporation
of
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within attorney(s) for
upon in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this day of 19

Index No. Year 19
IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-VS-

DAVID BRYANT,

Defendant-Appellant.

ORIGINAL

AFFIDAVIT OF SERVICE

ALFRED P. KREMER

Attorney for Defendant-Appellant

Office and Post Office Address, Telephone

200 Times Square Building

ROCHESTER, NEW YORK 14614

(716) 546-6040

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Sir:— Please take notice

NOTICE OF ENTRY

that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on

19

NOTICE OF SETTLEMENT

that an order

of which the within is a true copy will be presented for

settlement to the HON.

one of the judges

of the within named Court, at

on the day of

19 at M.

Dated,

Yours, etc.

ALFRED P. KREMER

Attorney for

Office and Post Office Address

200 Times Square Building

ROCHESTER, NEW YORK 14614

To

Attorney(s) for